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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 549 '29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 15

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Plaintiffs-Appellants,
220 Broadway,
New York City.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050 110

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JURISDICTIONAL STATEMENT PURSUANT TO RULE 15

Opinion Below

The court below was a three-judge court, appointed pursuant to 28 U. S. C. A. §§2282 and 2284, sitting in and for the Southern District of New York. It rendered a single opinion for all of the above-captioned actions. This opinion is reported in 125 F. Supp. 498 and is appended hereto as required by Rule 15(a) and (h) of the Revised Rules of this Court.

Jurisdiction

(i) The actions herein were instituted for judicial review of a final agency action, pursuant to 5 U. S. C. A. §1009, in forms of proceeding authorized by 5 U. S. C. A. §1009 (b). This appeal is from an order and judgment dismissing the complaints and denying motions for injunctions *pendente lite.*

(ii) The opinion and order of the court below was rendered and entered on October 11, 1954 and a judgment thereon made and entered on December 1, 1954. The notice of appeal herein was filed on December 7, 1954 in the United States District Court for the Southern District of New York.

(iii) Jurisdiction of the appeal herein is conferred upon this Court by 28 U. S. C. A. §§2101 and 1253.

(iv) The following cases are believed to sustain the jurisdiction of this Court: *American Communications Association* v. *Douds,* 339 U. S. 382 (1950); *Coffman* v. *Breeze Corporations,* 323 U. S. 316 (1945).

(v) The statute of the United States whose validity is involved is 8 U. S. C. A. §1252(d) [Section 242(d) of the Immigration and Nationality Act of 1952; 66 Stat. 163]. The text of this section is as follows:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six

months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or wilfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

The administrative regulation promulgated pursuant to authority purportedly granted by the statute and whose validity is challenged is 8 C. F. R. §242.3(c) [Section 242.3 (c) of the Immigration and Nationality Regulations]. The text of this regulation is as follows:

"An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of

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such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of Section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification.

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

Questions Presented

(1) Whether an action under the Administrative Procedure Act, 5 U. S. C. A. §1009, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, for judicial review of that order in the form of proceeding authorized by 5 U. S. C. A. §1009(b), presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution.

(2) Whether an action for declaratory judgment, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, presents a case or con-

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troversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(3) Whether, in the action set forth in (2) above, the party plaintiff is entitled to temporary or permanent auxiliary equitable relief from the order, where it is shown that compliance with the order has or will deprive the plaintiff of liberty, property and civil rights and that violation of the order would subject the plaintiff to multiple criminal penalties.

(4) Whether an action for injunction or mandamus, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, to relieve the plaintiff from the obligations imposed upon him by the order, presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(5) Whether, in the action set forth in (4) above, it is a proper exercise of the court's discretion to grant relief, once the order—creating obligations, compliance with which deprives the plaintiff of liberty, property and civil rights and violation of which subjects him to multiple criminal penalties—is issued, although no violation of its terms has been committed and no criminal prosecution has been specifically threatened or begun.

(6) Whether 8 U. S. C. A. §1252(d), which attaches criminal consequences to an administratively found order of deportation and does not permit independent judicial inquiry into its validity, on its face, infringes upon procedural due process of law guaranteed by the Fifth Amendment, and, as applied to the deportation orders against

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the appellants which are based upon a finding of past membership in the Communist Party *eo nomine*, is a bill of attainder and *ex post facto* law.

(7) Whether 8 U. S. C. A. §1252(d), on its face, unlawfully delegates legislative power to the Attorney General, and, as applied, constitutes an unlawful re-delegation and usurpation by him of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(8) Whether 8 U. S. C. A. §1252(d), on its face and as applied, is so vague and indefinite as to encompass within its terms, constitutionally protected conduct and activity in violation of the First and Fifth Amendments and as to give inadequate notice of the crime created by it in violation of the Fifth Amendment to the United States Constitution.

(9) Whether an alien, against whom a final administrative order of deportation has been outstanding for more than six months and whose deportation cannot be effected, subjected to "supervision" within the meaning of 8 U. S. C. A. §1252(d) and 8 C. F. R. 242.3(c) on their face and as applied, is thereby deprived of liberty and property without due process of law in violation of the Fifth Amendment, subjected to punishment in violation of the Fifth and Eighth Amendments, deprived of equal protection of the law in violation of the Fifth Amendment, and deprived of rights of free speech and association in violation of the First and Fifth Amendments to the United States Constitution.

(10) Whether the orders issued to the appellants, which establish conditions of "supervision", pursuant to 8 U. S. C. A. §1252(d) and 8 C. F. R. 242.3(c) are, on their face and as applied, unreasonable and an abuse of power, in violation of 8 U. S. C. A. §1252(d) and the Fifth Amendment to the United States Constitution.

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Statement of the Case

The actions herein were brought by each of the appellants, under the Administrative Procedure Act, §1009 of Title 5 U. S. C. A., to review orders of Edward J. Shaughnessy, the District Director of the Third District of the Immigration and Naturalization Service, to wit: "Orders of Supervision" issued by him to each of the appellants pursuant to the authority purportedly vested in him by 8 U. S. C. A. §1252(d) and the regulations promulgated thereunder by the Attorney General: 8 C. F. R. §242.3(c).

Each of the appellants is the subject of a deportation proceeding, and against each of them there has been entered a final administrative order of deportation. These orders were based on an administrative finding, in each instance, that, after entering the United States, each of the appellants had been a member of the Communist Party of the United States. In each case, more than six months is elapsed since the entry of the deportation order.

Where more than six months elapse after the entry of a final administrative order of deportation against an alien, the provisions of 8 U. S. C. A. §1252(d) and 8 C. F. R. §242.3(c) require that the alien be placed under "supervision" as defined by their provisions. Under the alleged authority of the statute and regulations, the appellee made and issued an "Order of Supervision" against each of the appellants. These "Orders of Supervision" imposed regulations of and restrictions upon the conduct and activities of each of the appellants substantially as follows:[1]

> "That said alien shall upon request produce himself at a time and place designated for the purpose of sub-

1. The court below recognized that: "The orders of supervision vary in certain unimportant respects, e.g., in the numbering of regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted." [125 F. Supp. at 500, ftn. 3.]

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mitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

"That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

"That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

"That said alien shall report in [PERSON] on [day varies] of each week between 8:45 A.M. and 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

"That said alien shall terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.

"That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph 6.

"That said alien shall not violate Section 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

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The actions herein were commenced following the issuance of these orders. The appellants, in effect, demanded "judicial review" of the "Orders of Supervision", within the purview of 5 U. S. C. A. §1009(a), as "persons suffering legal wrong because of an agency action [and] adversely affected [and] aggrieved by such action." The complaints were bottomed upon the charge (1) that 8 U. S. C. A. §1252(d); 8 C. F. R. §242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon the conduct and activities of the appellants incorporated therein, are unconstitutional, invalid, illegal, void and inoperative; and (2) that the regulations of and restrictions upon the conduct and activities of the appellants, incorporated in the "Orders of Supervision", are unreasonable and an abuse of power.

The "forms of proceeding for judicial review" elected by the appellants, under the prescriptions of 5 U. S. C. A. §1009(b) were actions for: (1) a judgment declaring unconstitutional, invalid, illegal, void and inoperative: 8 U. S. C. A. §1252(d); 8 C. F. R. 242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon their conduct and activities incorporated in the "Orders of Supervision"; and (2) as auxiliary relief, an order that the appellee (a) be directed to set aside and cancel the "Orders of Supervision"; and (b) be enjoined and restrained from requiring the appellants (i) to submit to supervision as required by the "Orders of Supervision"; or (ii) to comply with the regulations of or restrictions upon their conduct and activities, incorporated in the "Orders of Supervision". By orders to show cause, the appellants moved for equitable relief *pendente lite*.

The appellee cross-moved with respect to all fourteen complaints for an order: (1) dismissing the complaints, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable

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party; (2) vacating and dissolving extant temporary restraining orders, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and 28 U. S. C. A. §2284(3); and (3) appointing a three-judge court, in accordance with the provisions of 28 U. S. C. A. §§2282 and 2284, to hear and determine the matters in issue.

The appellee's application for the appointment of a three-judge court, unopposed by the appellants, was granted by orders dated June 21, 1954 and June 23, 1954. The case came on to be heard June 30, 1954 before Hon. HAROLD J. MEDINA, United States Circuit Judge, and Hon. JOHN F. X. MCGOHEY and Hon. EDWARD WEINFELD, United States District Judges. On October 11, 1954, this court ordered that the complaints be dismissed for want of a justiciable controversy, the motions of the appellants for injunctions *pendente lite* denied, and the temporary restraining orders vacated. A judgment to this effect was made and entered on December 1, 1954.

A motion for a stay of the enforcement of the "Orders of Supervision" pending appeal to this Court was made to the court below and denied on December 17, 1954. A similar motion was made thereafter to Mr. Justice FRANKFURTER, pursuant to Rules 51, 50 and 18 of the Revised Rules of this Court. On January 3, 1955, he rendered a decision denying the stay requested. He concluded, however, that the appeal presented "legal questions which do not appear * * * to be frivolous [and which] will call for adjudication, issues that concern restraints on liberty." To assure that "the case reach [the] appellate docket for early argument", he suggested a schedule designed to bring the case before the January 29, 1955 conference of this Court and, "if set for argument," for hearing "at the session of the Court beginning February 28, 1955". The timetable he recommended was the perfection of this appeal by the appellants by January 15, 1955 and a commensurate relinquishment by the Government of its time to respond.

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Reasons for Plenary Consideration of the Questions Presented

Every aspect of this appeal presents for decision questions of law not heretofore decided by this Court. It is the first to challenge in this Court the validity of Section 1252(d) of Title 8 U. S. C. A. and its application. It is also the first which calls upon the Court to adjudicate the scope of the special remedy against invalid agency action created by sections of the Administrative Procedure Act. [*See*: FRANKFURTER, *J.*, concurring in *State of Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127, 147 (1947)]. The necessity for the resolution of these questions arises not only from the effect upon these appellants of the lower court's construction and application of the statutes involved. It stems also from the necessary impact of those laws and that decision upon many thousands of others and upon a whole system of law, long acknowledged to govern the rights not only of aliens, but of citizens as well. The challenged statute ordains and establishes an administrative tyranny over the lives of aliens to whom this nation of immigrants has historically afforded, as a matter of right, the protections of its first bulwark against tyranny: the United States Constitution. [*See e.g.*: *Chew* v. *Colding*, 344 U. S. 590 (1953)]. The decision of the court below, whose construction of the remedial statute forestalled a judicial examination of the substantive law and its application, creates a general legal impediment to recourse against administrative encroachment upon the rights of citizen and alien alike. The far-reaching implications which inhere in the aspect of the case which the lower court did decide as well as in the phase that it did not decide imperatively call for consideration of this appeal by the Court.

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A.

The Threshold Question

The determination of the court below was made without reaching the merits of the controversy. It turned merely upon the resolution of a threshold jurisdictional question. The gravamen of its decision appears to be that:

> "The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate; and it has long been settled law that the constitutional powers of the courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do."

As this Court stated in *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291 (1906): "The soundness of the doctrine relied upon is undoubted. * * * The difficulty is that the doctrine is inapplicable to this case. * * * "

Section 1009 of Title 5, U. S. C. A., a section of the Administrative Procedure Act, authorizes judicial review of the rectitude of administrative orders by persons "aggrieved" by them. It is this remedy that the appellants sought. The decision of the court below reveals an unawareness that this was the relief requested. The premises upon which its conclusion is founded that it is "to clear for reasonable debate" that there is a "lack of any actual and existing controversy between the parties plaintiff and defendant" demonstrate the court's erroneous conception of the instant actions as devices to relieve the appellants, either by way of declaratory judgment or injunctive orders, from criminal prosecution. The decision below rested

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upon *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947)—inapt in any event—an action for simple declaratory judgment and injunctive relief, thus re-inforcing the impression that the court below neglected to adjudicate the right of the appellants to the specific remedy for which they brought suit. Mr. Justice FRANKFURTER, concurring in *State of Oklahoma* v. *United States Civil Service Commission, supra* at 147, recognized the special character of the relief authorized by the review provisions of the Administrative Procedure Act and the need for their independent judicial interpretation.

> "The Administrative Procedure Act does not apply to the present case. * * * The Act will, in due course, present problems for adjudication. We ought not to anticipate them when, being irrelevant, they are not before us. The Act ought not to be used even for illustrative purpose because illustrations depend on construction of the Act. * * * "

The disposition of the court below to treat the appellants' demand for relief as so much surplusage, not only conflicts with such a view of the Administrative Procedure Act, but, in effect, repudiates its very existence. The empiric fact of its inscription on the statute books, however, is plain. The pattern for the construction of the section invoked by the appellants has been evolved by this Court in decisions construing analogous laws. Application to this case of the rationale which guided this Court's prior determinations should inexorably have produced a result diametrically contrary to the determination made by the lower court.

The majority of this Court in the *Oklahoma* case, which was instituted under the review provisions of the Hatch Act, was based upon an underlying thesis appropriate to the pertinent provisions of the Administrative Procedure Act. It stated:

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"Congress has power to fix conditions for review of administrative orders. By providing for judicial review of the orders * * * Congress [made them] * * * a matter of judicial cognizance. * * * *" [at 137].

This expression is consonant with innumerable decisions of the Court, long acknowledged as the settled law. It has been held that where an administrative order is final,[2] and where the order commands the individual "to do or to refrain from doing anything,"[3] and where legal consequences may flow from the order,[4] the demand for judicial review presents, in the constitutional sense, a "case" or "controversy" between the parties.[5]

The controversy is said to relate to whether or not the administrator may, with legal impunity, require the subject of his order "to do or refrain from doing" those things specified in the order. The adverse parties are considered to be the administrator, insisting on his right, and the subject, resisting the demand as impermissible in law. In *Old Colony Trust Co.* v. *Commissioner of Int. Rev.*, *supra* at 724, the Court held:

"In the case we have here, there are adverse parties. The United States or its authorized official asserts its

2. *La Crosse Telephone Corp.* v. *Wisconsin Emp. Bd.*, 336 U. S. 18 (1949); *Eccles* v. *Peoples' Bank of Lakewood Village*, 333 U. S. 426 (1948); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).
3. *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-10 (1927).
4. *Rochester Telephone Corp.* v. *United States*, *supra*, at 132-33.
5. *La Crosse Telephone Corp.* v. *United States*, *supra*; *State of Oklahoma* v. *United States Civil Service Comm'n*, *supra*; *Rochester Telephone Corp.* v. *United States*, *supra*; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156 (1939); *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933); *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930); *Old Colony Trust Co.* v. *Comm'r of Int. Rev.*, 279 U. S. 716 (1929); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893).

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> right to the payment by a taxpayer of a tax * * * and the taxpayer is resisting that payment. * * * That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. * * * "[6]

In the instant cases, clearly, the "Orders of Supervision" are final, as the lower court itself recognized when it stated that the appellee "has no power to take any further action beyond what he has already done." Each "Order of Supervision" establishes a series of specific things that the appellants must do or refrain from doing. That legal consequences flow from the "Orders of Supervision" is evident under the challenged statute and it is recognized in the statement of the court below to the effect that: "A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine." The appellee asserts his right to promulgate and issue the "Orders of Supervision" and the appellants controvert the existence of such a right.

The court below misplaced its reliance on the *Mitchell* case, in which no specific order had been directed against the individual complainants. In the instant actions, as in the *Oklahoma* case, the action of the administrator had ripened into a final administrative order, embodying specific directives, against the appellants. Controversy over such an order, in the analogous review proceedings of the *Oklahoma* case, was held to be justiciable by this Court.

That the "Orders of Supervision" are reviewable orders, the legal validity of which are in controversy, in the constitutional sense, between the appellants and the appellee, appears to be beyond doubt under the applicable

6. *Accord*: *Rochester Telephone Corp.* v. *United States, supra; Federal Power Commission* v. *Pacific Power & Light Co., supra; Federal Radio Commission* v. *General Electric Co., supra; Cf. Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894).

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authorities. The court below reasoned to a contrary conclusion from circumstances which this Court has held not to defeat judicial review.

The court below ruled that no present controversy exists because the "Orders of Supervision" in and of themselves do not inflict penalties for violation, but that the exaction of penalties depends on measures other than the issuance of the orders by the appellee. That governmental action over and beyond the issuance of the "Orders of Supervision" is needed to effect sanctions for disobedience, does not detract from the present reviewability of the "Orders of Supervision". In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 417-18 (1942), the Court held:

> "The regulations are not less reviewable because their promulgation did not operate of their own force to deny or cancel a license. * * * Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. * * * Such regulations have the force of law before their sanctions are invoked as well as after. * * * When * * * they are promulgated by order * * * they are appropriately the subject of attack. * * * "[7]

The court below ruled that the controversy cannot exist between the appellants and the appellee because, upon violation of the "Orders of Supervision", it would not be the appellee but "the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted." Yet, in *Rochester Telephone Corp.* v. *United States, supra* at 136,

7. *Accord*: *La Crosse Telephone Corp.* v. *United States, supra*; *Rochester Telephone Corp.* v. *United States, supra*; *Powell* v. *United States*, 300 U. S. 276 (1937).

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the Court, discussing one of its prior opinions as having "partly yielded to the Government's main contention that the [review] statute applied only where the order [of the Commission] complained of was one which was to be enforced by the Commission," held:

> "More recent decisions of the Court, however, have dispensed with this requisite for review. • • • "

The rationale of this Court would seem to be that although the order is made by the administrator, "not for further proceedings by [himself], it is nonetheless a part of a regulatory scheme. • • • " *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 182 (1938). A court's mandate, under these circumstances, is considered an adequate conclusion of the controversy, for "while penalties may be imposed by the statute for its violation and not for disobedience of the [administrative] order, a favorable order [by the court] would render the prohibitions of the statute inoperative. • • • " *Rochester Telephone Corp.* v. *United States, supra* at 132-33. Any other construction of [a review statute] would make it necessary for a [person] to take the risk of [acting] illegally and incurring criminal penalties in order to secure a determination [of his rights]." *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 436 (1946). The existence of an order fixing the responsibilities of its subject, is not an abstract declaration by an administrator, but "necessarily and immediately carries direction of obedience." *See*: *Rochester Telephone Corp.* v. *United States, supra* at 143-44. A complainant need neither violate the order,[8] as the court below suggests, or establish with certainty, as it further insists, that proceedings will be begun to enforce the penalty incurred for non-compliance. *Columbia Broadcasting System* v. *United States, supra* at 418-20. "The purposes sought to be accomplished

8. *See*: *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210 (1908).

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by [a review statute] would be defeated if a suitor were unable to resort to them to avoid * * * injury resulting from * * * the legal consequences of the [administrative] order * * * *" *Columbia Broadcasting System* v. *United States, supra* at 419.

It is quite clear, therefore, that the decision of the lower court was in error in avoiding a necessary determination under the applicable law and in accepting, as its theses, premises tending to emasculate remedies available for relief from oppressive administrative action.

The decision of the court below would be in error even were the appellants not relying on the remedy accorded them by the Administrative Procedure Act. Administrative action has long been subject to challenge in ordinary injunction[9] and declaratory judgment[10] actions. The lower court's discomfort concerning the adversary character of the relationship between the appellants and the appellee, seems to stem from the fact that disobedience of the orders of the appellee incurs a penalty not to be affected by him. That this fact should have moved the court below to its conclusion that the parties are not adversaries would seem evidence of an infirmity which Professor Edwin Borchard considers general "in the field of statutes regulating commercial or civil life." He states: "* * * the appendage of a penalty to the regulation ["the least important element of the regulation"] seems to anesthetize the imagination and power of analysis."[11]

The approach of the court below is what has been termed "the unrealistic attitude that a person whose activities are

9. *Stark* v. *Wickard*, 321 U. S. 288 (1944).
10. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952); *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541 (1948).
11. *Borchard, Challenging "Penal" Statutes*, 52 Yale L. J. 445, 475 (1943).

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within the purview of the statute can only be affected thereby when its sanctions are enforced against him."[12] This Court has rejected the idea that the issuance of the administrative order, separately enforceable, cannot presently injure the party subject to it in light of his present freedom to obey it or not. "They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. • • • " *Columbia Broadcasting System* v. *United States*, *supra* at 419. The administrator is considered "part of the regulatory scheme,"[13] and a judgment adverse to his action will have effect in that it "will render the [penal] provisions of the statute inoperative."[14] It is clear that even under circumstances where the administrator is not to impose the penalties for violation of his order, he is, nonetheless, an adverse party, and a proper defendant. This Court has accepted him as such both in declaratory judgment[15] and injunction actions.[16]

Certainly violation of the order is no precondition to justiciability in a declaratory judgment action, whose function it is to avoid "any risk of suffering penalty, liability or prosecution." *Public Service Commission* v. *Wycoff Co.*, *supra* at 245-46.[17] Nor is it a prerequisite to injunctive relief.[18] Even were the effect of the injunctive relief to be deemed in the nature of an injunction against criminal

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12. Note, 25 N. C. L. Rev. 486, 487 (1947).

13. *Shields* v. *Utah Idaho Cent. R. Co.*, *supra*.

14. *Rochester Telephone Corp.* v. *United States*, *supra*.

15. *Connecticut Mutual Life Ins. Co.* v. *Moore*, *supra*.

16. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912).

17. *See also*: *Alvater* v. *Freeman*, 319 U. S. 359 (1943).

18. *Hill* v. *Florida*, 325 U. S. 538 (1945); *Cf. United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940).

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prosecution, pre-enforcement relief is available.[19] The issuance of the order itself, part of the regulatory scheme, as are the "Orders of Supervision", is sufficient notice of full enforcement of the statutory scheme to constitute the threat requisite to invoke equitable jurisdiction.[20] Particularly where the directives of the order are couched in language so vague as to render even purported compliance a risk, as is the language in the "Orders of Supervision", specific threat of the invocation of the criminal sanctions of the act is not of the essence.[21] The risk involved in violation of the "Orders of Supervision" is not prosecution for a single transaction. The "Orders", in effect, create an entire way of life for the appellants. In a single week, were the appellants to assume to live as though the "Orders" were not extant, the pyramided penalties for violation could jail them for the balance of their lives, and fines imposed could total more than their life-time's expectation of income. Historically, in such circumstances, courts of equity have acted to avert such injury.[22]

From the view of declaratory judgment or injunction actions, the lower court's decision would appear to be an anachronism and in conflict with precedent established by this Court.

The controversy between the parties is justiciable, in the Constitutional sense, under any view of the form of procedure pursued by the appellants.

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19. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Dobbins* v. *Los Angeles*, 195 U. S. 223 (1904); *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207 (1903).

20. *City Bank* v. *Schnader*, 291 U. S. 24 (1934).

21. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925).

22. *See e.g.*: *Ex parte Young*, 209 U. S. 123 (1908); *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

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B.

The Merits of the Case

I. Section 1252(d), on its face, deprives appellants of procedural due process in violation of the Fifth Amendment and, as applied, violates Article 1, Section 9 of the United States Constitution.

(a) Section 1252(d), on its face, violates the due process clause of the Fifth Amendment.

In *United States* v. *Spector*, 343 U. S. 169 (1952), the Supreme Court had before it Section 20(c) of the Immigration Act of 1917, as rewritten in Section 23 of the Internal Security Act of 1950 [8 U. S. C. A. §156(c)], which is presently rewritten as Section 242(e) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. §1252(e)]. That statute, in the words of Mr. Justice JACKSON, "creates a crime * * * based on unlawful residence in the United States. The crime consists of two elements, one, an outstanding order for deportation of an alien, the other, the alien's willful failure to leave the country or take specific steps toward departure." *United States* v. *Spector*, *supra* at 177.

The majority of the court did not consider the question of whether the statute, on its face, constituted a denial of procedural due process of law, for the reason that:

> "That question was neither raised by the appellee nor briefed nor argued here." [*Id.* at 172].

The Court added:

> "If it had been, we might consider it. [*Ibid*] * * * That question is not foreclosed by this opinion." [*Id.* at 173].

Mr. Justice JACKSON, speaking in dissent with the concurrence of Mr. Justice FRANKFURTER, characterized, as fol-

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lows, the Court's omission to treat the procedural due process aspects of the statute. He stated:

> "The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel." [*Id.* at 180].

Mr. Justice BLACK, dissenting separately on the main issue decided by the majority, on this question, stated nevertheless:

> "My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by Mr. Justice Jackson, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz*, 333 U. S. 56, 78-81." [*Id.* at 174, ftn. 2].

Mr. Justice JACKSON, with the concurrence of Justices FRANKFURTER and BLACK, on the issue left open by the majority, considered the statute, on its face, to be unconstitutional, in reliance upon *Wong Wing* v. *United States*, 163 U. S. 228 (1896), for the following reason:

> "The Act does not permit the court which tries [the alien] for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted." [*Id.* at 177].

Section 1252(d) creates a crime analogous to that in the *Spector* case. It consists of two similar elements: one, an outstanding order for deportation of an alien; the other, the alien's willful or knowing failure to comply with regu-

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lations of and restrictions upon his conduct imposed by the Attorney General. Read as Mr. Justice JACKSON reads the *Spector* section, Section 1252 clearly does "not permit the court which tries [the alien] for this crime to pass on the legality of his presence." Under Section 1252(d) also, the "production of an outstanding administrative order for [the alien's] deportation becomes conclusive evidence" of his deportability and the "consequent duty" to comply with the regulations of and restrictions upon his conduct. Neither does Section 1252(d) permit "inquiry into the correctness or validity of the order." Under it, too, "a deportation order is made to carry potential criminal consequences," and the administrative decision on the issue of unlawful presence is made "conclusive upon the criminal trial court," thus permitting this "vital element" of the crime to be established without a jury trial. *United States* v. *Spector, op. cit. supra* at 177-78.

Mr. Justice JACKSON concluded in the *Spector* case that since the "adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime," the government constitutionally, may not be permitted to "use the result as a conclusive determination of that fact in a criminal proceeding." *Id.* at 178, 179. The statute, in that it enabled such a procedure, he considered to be unconstitutional on its face as a violation of the Fifth Amendment. These same conclusions are impelled in the instant proceedings by the existence, in the section of the statute involved here, of identical constitutionally objectionable elements.

(b) Section 1252(d), as applied, is a bill of attainder and ex post facto law.

As applied to the facts of this case, Section 1252(d), in making the deportation orders against the appellants

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"carry potential criminal penalties," is a bill of attainder and an *ex post facto* law in violation of Article 1, Section 9 of the United States Constitution.

The orders of deportation against the appellants rest upon the findings of fact and conclusions of law, under 8 U. S. C. A. §137 [now 8 U. S. C. A. §1251], that the appellants had been, after entry, members of the Communist Party.

The Act, under which the appellants were found deportable, obviously makes deportable members of an easily identifiable class, namely: "alien members of the Communist Party of the United States." This designation, as well, is one that differed from all prior designations of deportable aliens, which had theretofore been enacted into law by Congress. As Mr. Justice REED remarked in *Carlson* v. *Landon*, 342 U. S. 524, 535 (1952):

> "Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow of the government of the United States, but the Internal Security Act [8 U. S. C. A. §137] made Communist membership alone of aliens a sufficient ground for deportation."

The description of this class differs from other deportable aliens in prior deportation statutes, in that it describes a specified, named organization, not the undesirable characteristics of an organization which are deemed by Congress to indicate that an alien with such affiliation is an undesirable alien. *Mahler* v. *Eby*, 264 U. S. 32 (1924).

Nor can it be said that the designation of the "Communist Party" is the equivalent of the long-standing statutory class: an organization which advocates the violent overthrow of the Government, because it represents a rea-

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sonable determination by Congress, based on adequate evidence, that the Communist Party is an organization which advocates the violent overthrow of the government.

This provision proscribing the Communist Party by name did not replace the expulsion provisions which had been previously employed against alien members of the Communist Party. The Internal Security Act [former 8 U. S. C. A. §137] kept, and the new Immigration and Nationality Act [8 U. S. C. A. §1251] still keeps, the provision expelling past and present alien members of any organization which advocates the violent overthrow of the government. There also remains the provision expelling aliens who themselves advocate such doctrine.

Thus, the deportation statute, under which the instant deportation orders were procured is, in that it is directed at the members of an easily identifiable class, in the nature of a bill of attainder. *United States* v. *Lovett*, 328 U. S. 303 (1946). And since it relates to past conduct, not theretofore subject to legal sanction, it is in the nature of an *ex post facto* law. *See*: *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952). *Galvan* v. *Press*, 347 U. S. 522 (1954) is not to the contrary insofar as the Court approved the constitutionality of the statutory designation of the Communist Party *eo nomine* only in terms of its reasonableness as a classification under the Fifth Amendment, and not with regard to the prohibitions of Article 1, Section 9 of the United States Constitution.

In the *Harisiades* case, *supra*, however, it was considered that, in line with prior adjudications, the constitutional objections to the deportation statute as a bill of attainder and *ex post facto* law could not prevail for the reason that a deportation proceeding was civil and not criminal in nature, and deportation itself, not punishment for a crime. The Court there declared:

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> "It has always been considered that that which [is forbidden] is penal legislation. * * * Deportation, however, severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy, supra* at 594.

This was re-emphasized, as has been shown by Mr. Justice JACKSON, in the *Spector* case, in his statement: "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations." *United States* v. *Spector, supra* at 178.

Section 1252(d), however, as has been shown, adds such "criminal consequences and connotations". It, therefore, supplies the one element, the absence of which has been relied upon to uphold the constitutionality of the deportation statute which created the new category of deportables: "alien members of the Communist Party." Under the circumstances, as applied to these appellants, Section 1252(d) constitutes a bill of attainder and an *ex post facto* law.

II. Section 1252(d), on its face and as applied, deprives appellants of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

It is well-settled and existing law that aliens, except for liability to deportation and its "incidents", are to be accorded, as a matter of constitutional mandate, all property and civil rights and liberties accorded to citizens. *See, e.g. Chew* v. *Colding, supra* at 596, ftn. 5; *Bridges* v. *Wixon*, 326 U. S. 135 (1945). The political power of the government to expel aliens deemed undesirable, however, cannot be used to deprive them of these liberties and property

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rights without due process of law. *United States ex rel. Ross* v. *Wallis*, 279 F. 401, 403 (C. C. A. 2d, 1922); *Petition of Brooks*, 5 F. 2d 238, 239 (D. C. D. Mass. 1925).

The power to hold in custody or otherwise restrict the liberty of deportable aliens, by administrative fiat and without judicial trial, has been permitted only as an "incident" to the power to deport or exclude, pending deportation proceedings, and "while arrangements were being made for their deportation." *Wong Wing* v. *United States, supra; see, Carlson* v. *Landon, supra.*

The Court of Appeals for the Second Circuit recently restated the rule, as extant law. In its decision in *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, 967 (C. A. 2d, 1952), the Court said:[23]

> "• • • the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See Walker v. Chief Quarantine Officer, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men • • • such confinement must violate the Fifth Amendment."
>
> "• • • But where • • • confinement is no longer justifiable as a means to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, 'whether citizens, aliens, alien enemies or enemy belligerents'. Rutledge, J., dissenting in Re Yamashita, 327 U. S. 1, 41, 42."

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23. Reversed as inapplicable to an *excludable* alien as opposed to *deportable* aliens as are the appellants. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953).

Section 1252(d) fixes the period during which the Attorney General may hold an undesirable alien in confinement while arranging for his actual deportation. If he has not arranged for, or effectuated the alien's removal within six months after a final administrative order of deportation has been made, his power to detain the alien ends, and the alien must be given his freedom. See: *United States ex rel. Mezei* v. *Shaughnessy, supra* at 968; *United States ex rel. Kusman* v. *Shaughnessy,* 117 F. S. 541, 544-45 (D. C. S. D. N. Y. 1953); *United States ex rel. Blankenstein* v. *Shaughnessy,* 117 F. S. 699, 701, 703 (D. C. S. D. N. Y. 1953).

This provision has been construed to accord with constitutional mandates [*United States ex rel. Mezei* v. *Shaughnessy, op. cit. supra* at 967], and comports with judicial interpretation as to the propriety of the exercise of powers incidental to the right to deport. The courts generally have held that custody, whether by direct physical detention or by other control, pending actual deportation, which exceeds four to six months, constitutes an unreasonable and, therefore, an unlawful restraint. *United States ex rel. Ross* v. *Wallis, supra; Petition of Brooks, supra; Saksagansky* v. *Weedin,* 53 F. 2d 13 (C. C. A. 9th, 1931); *United States ex rel. Dzuro* v. *District Director,* 102 F. S. 704 (D. C. S. D. N. Y. 1951).

Subsection (d) of Section 1252, however, purports to extend authority to exercise powers, normally incidental to deportation, even after the power to deport has become—either temporarily or permanently—inviable, by reason of the inability to effect deportation. The Attorney General is authorized and directed to supervise and impose conditions and restrictions upon the life, liberty and property of those aliens whose removal from the United States has been ordered, but cannot or may not be effected, for an un-

limited time after, by statute—the same statute—the power to detain to make "arrangements" for deportation, has ended.

These powers transcend the political power of the government to deport and to restrain or regulate as an "incident" to deportation. Since the conditions and restrictions which Section 1252(d) prescribes be placed upon an alien's liberty and property may, under the terms of Section 1252(d), be imposed without resort to "those indicia of legal procedure that are embedded in the constitution as the right of all men," they constitute an illegal and unconstitutional deprivation of the alien's liberty and property. The statute, in that it authorizes such deprivations, violates, on its face, the due process provision of the Fifth Amendment.

In *Wong Wing* v. *United States, supra*, this Court clearly determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and, constituted a violation of the Fifth Amendment. The Court struck down the "Geary Act" [Section 4, Act of May 5, 1892] as a transgression of the Fifth Amendment, for authorizing a year's imprisonment for Chinese aliens found, without judicial trials, to be in this country unlawfully. It held that Congress cannot "promote its policy in respect to Chinese persons by adding to its provisions for their expulsion and exclusion punishment by imprisonment at hard labour", inflicted without judicial trial. *Id.* at 235.

The rationale of the Court relating to the Geary Act is clearly applicable to Section 1252(d), which is its analogue. The Geary Act, in the view of the Court, without judicial trial, deprived Chinese aliens of liberty by authorizing their imprisonment for a year. Section 1252(d) similarly seeks, without judicial trial, to deprive aliens of liberty

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and property by subjecting them to supervision which does and may further circumscribe their movements, restrict and impair their normal living and their right to work for an unlimited period of time—conceivably as long as they may live or until their departure from the United States can be effected. "Liberty" is not restricted in its import to freedom from imprisonment. This Court, in its recent decision, *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954) ruled:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * * "

See also: *Williams* v. *Fears,* 179 U. S. 270, 274 (1900); *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589 (1897); *Bauer* v. *Acheson,* 106 F. S. 445, 450 (D. C. D. C. 1952).

That the power to deport does not, as well, include the right, without judicial trial, to restrict and impair freedom, liberty and property rights of aliens, although short of actual imprisonment, was sharply enunciated by Circuit Judge Anderson in *Petition of Brooks, supra.* The order of deportation against the alien in that case, concededly, could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge Anderson rejected this contention as unlawful and pointed out:

> "He is entitled to be deported or to have his freedom * * * any further detention by the Immigration authorities *or control of* [*the alien's*] *freedom is illegal.*" [at 235, 240] (Emphasis added.)

The conditions circumscribing and restricting the lives and livelihoods of the instant appellants, authorized by the

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statute and imposed by the appellee, are such a "control of [their] freedom" as to render illegal both the statute, the regulation and the "Orders of Supervision" requiring the appellants to conform to the conditions.

Subjection to "supervision" is itself a "control of freedom" of far greater consequence than the control by bond in *Petition of Brooks, supra.* The statute here, moreover, requires and the "Orders of Supervision" direct the appellants to report to an officer of the Immigration and Naturalization Service, a restriction of freedom disapproved in *Petition of Brooks, supra.* The requirement that the appellants appear for medical or psychiatric examination is clearly of the same nature. The requirements of some of the appellants that they remain within a 50 mile radius of Times Square and remain residents of the Third Immigration District, unless with express permission of the appellee to be granted or withheld in his unrestricted discretion, are clearly deprivations of their liberty. In *Williams* v. *Fears, supra,* this Court declared:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the constitution." [at 274]

Accord: *Bauer* v. *Acheson, supra; Walker* v. *Chief Quarantine Officer,* 69 F. S. 980, 983 (D. C. D. Canal Zone Div. 1943).

The appellants are required to relinquish membership in the Communist Party—not in itself illegal; cease all support of, and all activities on behalf of all policies and doctrines of the Communist Party and its "affiliates"—whether legal or not; end their association with all members of the Communist Party or its affiliates, whether political in character, social or business, innocent or otherwise; to supply any and all information regardless of con-

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titutional or common law privilege. The right to be free f such restrictions is a right accorded to aliens, and is un- leniable, even after "judicial trial," as an infringement of 'irst Amendment rights.

The "supervision" authorized by the statute is of such latitude that it may be employed to—and in fact has— ffect or deprive the appellants of their jobs and liveli- oods, a property right which is theirs under the Consti- ution. *See*: *Takahashi* v. *Fish Comm'n*, 334 U. S. 410 1948) and cases cited therein.

The deprivation of the rights and liberties authorized by Section 1252(d) and accomplished here by the "Orders of Supervision", under circumstances where the exercise of he power to deprive no longer rests on the power to de- ort or powers incidental thereto, violates the Fifth Amendment, since the restrictions on liberty and property re imposed without due process of law, but by adminis- rative fiat.

In *Carlson* v. *Landon, supra,* the approval of the exer- ise of discretion to detain, based on the statutory cri- erion that detention would serve to eliminate an arrested lien's "opportunity to hurt the United States," hinged on he incidental power to detain *pending determination of leportability,* an area within the plenary power of Con- ress to expel, apparently, under the *Carlson* case, without et or hindrance from the Fifth Amendment. The rationale f the *Carlson* case is inapplicable here. In the instant ases, the deportation proceedings are completely at an nd, and deportation has become "patently impossible" or an unforseeable period of time. The Congress may not 'promote its policy" to protect the United States from he alleged activities which allegedly render an alien unde- irable, "by adding to its provision for their expulsion and xclusion" deprivations of life, liberty and property with- ut judicial trial. *Wong Wing* v. *United States, supra.*

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There exist still in the nation, for its protection, investigative agencies, criminal statutes, and "the speedy indictment and trial of actual crime in the courts." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 969. No other mode may be adopted consonant with constitutional due process.

III. Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth and Eighth Amendments to the United States Constitution.

(a) Section 1252(d) inflicts punishment without due process of law in violation of the Fifth Amendment.

In *Cummings* v. *Missouri*, 71 U. S. 277, 320 (1866), this Court established the proposition that:

> "The deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact. * * *"

The statute in question here permits the deprivation of, and the "Orders of Supervision" made against the appellants, deprive them of liberty, and rights—civil, political and property. In the circumstances under which these seemingly civil disabilities are authorized and were applied here, they constitute punishment. *See also*: *Ex parte Garland*, 71 U. S. 333 (1866); *Pierce* v. *Carskadon*, 83 U. S. 234 (1872); *Burgess* v. *Salmon*, 97 U. S. 381 (1878); *Harisiades* v. *Shaughnessy, supra*. The single "circumstance" that will render a civil disability a penalty or a punishment, is the absence of a reasonable relation to the power which the civil disability is intended to aid. *Cummings* v. *Missouri, supra* at 319-20.

Congress has, concededly, the plenary power to deport aliens it deems undesirable. As an incident to this power,

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it may authorize the control or the restriction of an alien's liberty pending deportation and while arrangements are being made for the actual deportation, on criteria which it deems fit, including its evaluation of the effect of the alien's freedom upon the welfare of the nation. [*See*: *Carlson* v. *Landon, supra*]. The power to employ such a criterion, as a basis for detention or control, ends when the power to detain or control ends: with the termination of the proceeding to deport and at that time when "deportation becomes patently impossible." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 967; *Wong Wing* v. *United States, supra.*

The power to "supervise" granted by Section 1252(d) and the "supervisory" power exercised over these appellants, have no reasonable relation to the exercise of any of the powers which Congress may exercise or authorize over deportation and the deportable alien. It is possible to see, from an analysis of the "Orders of Supervision" this lack of relation, which displays, as the oath in the *Cummings* case, *supra,* the punitive purport of the "Orders":

> "It was required to reach the person, not the calling. It was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." [at 320]

That the statute was not intended to be directed at control of the alien pending the conclusion of deportation proceedings, is patent from the fact that Section 1252(d) does not become applicable until six months after the final conclusion of a deportation proceeding. It is likewise clear that it is not a temporary control while arrangements are

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being made for deportation, for it is precisely the impossibility of effecting deportation within the prior six months that juvenates the power to supervise under Section 1252(d). And it comes into effect after that period during which the determination as to whether to control or not to control the liberty of the alien may be made on the basis of an evaluation that it is necessary for the welfare of the nation.

Nor can it be said that the statute or the "Orders of Supervision" are related to a power, perhaps inherent in the power to deport: to insure the capacity to deport and to avoid the frustration of that power. The disabilities imposed by the "Orders of Supervision" which most clearly indicate the punitive character of all of the disabilities, even those innocent on their face, appear in paragraphs 6 and 7 of the "Orders". [In some instances, the paragraph numbers are 5-a and 5-b.]

Paragraph 6 commands the appellants to terminate their membership in the Communist Party and its "affiliates" and their support and activity in behalf of the doctrines and policies of both. Paragraph 7 requires that the appellants refrain from any, or any type of association with members of the Communist Party and its "affiliates" or persons who support the doctrines or policies of either.

It is clear that mere membership in the Communist Party is not a crime. *See*: *Rogers* v. *United States*, 340 U. S. 367, 372, ftn. 12 (1951); 50 U. S. C. A. §783(f). It must, therefore, necessarily be so that other or different "associations" between Communists may be equally innocent. Nor has every policy or doctrine of the Communist Party been declared—even by the courts—to be unlawful [*United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2d, 1950)], nor in fact, may they be made so. *See*: *Jamison* v. *Texas*, 318 U. S. 413 (1943). Paragraph 6 and 7 of the "Orders of

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Supervision" deprive the appellants of their rights to these legal associations, to income which accrues to some of them as a result of these legal associations, and punishes a breach of the inhibitions against those associations by criminal penalties. Of these paragraphs, propounded under the aegis of Section 1252(d), it may be truly said, as in the *Cummings* case: "* * * it was thought that the several acts deserved punishment, and * * * there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

The remaining paragraphs of the "Orders" establish, as a substitute for the jail to which these appellants may not be sent, a system of police surveillance over their lives that differs only in degree, but not in kind, from imprisonment, and is, in fact, in the nature of a house arrest. They are limited in their travel area and their unrestricted choice of residence. They must report in person. Subsection (3) of the statute and paragraph 2 of the "Orders", providing for physical and mental examination and sweeping unlimited interrogatories, subject the appellants, as Justice BLACK, for the majority, stated in *Hines* v. *Davidowitz,* 312 U. S. 52, 71 (1941): "to a system of indiscriminate questioning similar to the espionage systems existing in other lands." An innocent purpose is not to be attributed to these regulations. They are not needed here to insure the deportation of these appellants. The "Orders" require that the appellants appear for deportation, when it can be effected [Paragraph (1)]. Their whereabouts are constantly known to the government by virtue of their alien registration, pursuant to 8 U. S. C. A. §1302, and changes in their residence must also be made known, and have been. These appellants, heretofore, have met their legal obligations to appear at all times when they might have been legally summoned.

Section 1252(d) authorizes, and the "Orders" herein provide a substitute for prison and penalties. They are punishment. Inflicted without due process of law, and solely by administrative fiat, they are in violation of the Fifth Amendment.

(b) Section 1252(d) inflicts cruel and unusual punishment in violation of the Eighth Amendment.

The Eighth Amendment, by its terms, prohibits the infliction of "cruel and unusual punishments." It was conceived, along with the other protections of the Bill of Rights, as a stricture against tyrannical encroachment upon the democratic rights of the people. 2 Story, *Commentaries on the Constitution* (5th Ed., 1891), Sec. 1903; Whalen, *Punishment for Crime: The Supreme Court and the Constitution,* 35 Minn. L. Rev. 109, 111 (1951); 3 *Elliott's Debates* 447, 448. Its initial purport may have been adumbrated by the long course of its usual employment as a protection against inhuman, barbarous or torturous punishment, or the "wanton infliction of pain." See: *Louisiana* v. *Resweber,* 329 U. S. 459 (1947). Yet the force of its original conception has not been lost to this Court. In *Weems* v. *United States,* 217 U. S. 349, 372-3 (1910), it stated:

> "* * * Surely they [authors of the Amendment] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprison-

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> ment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. *We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty', because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny*; of zeal for a purpose, either honest or sinister." (Emphasis added.)

In its most profound import, therefore, the Amendment's prohibitions are recognized to fall upon punishment whose imposition is designed to, or which tends to enforce, or which has the effect of enforcing, political conformity to the concepts of the sovereign. The kind, character and degree of punishment must be measured, case by case, against the yardstick of its power to bring about this illegitimate end. *See*: *Weems* v. *United States, supra; United States* v. *Ragen*, 54 F. Supp. 973 (D. C. N. D. Ill. E. D. 1944), *aff'd* 146 F. 2d 349, *cert. den.* 325 U. S. 865.

The controls on the appellants' liberty and property, authorized by Section 1252(d) and imposed by the "Orders of Supervision", constitute punishment. [*See*: *supra*, III (a)]. This punishment is of the kind whose "coercive cruelty" is such as to have the effect of enforcing political conformity and the abjuration of non-conformist, and, more particularly, Communist doctrines and policy, whether innocent or not. The punishment, quite obviously, is directed at the appellants as alleged Communists, and at their beliefs and activities. The disabilities which they

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are made to suffer are extended, if not perpetual. They are prohibited from exercising their conceded constitutional rights to be and speak as Communists, if Communists they are. They are consigned to a life of police surveillance over body, mind and thought, and are put under virtual house arrest. If these oppressive conditions may be imposed on these aliens, others, to avert the catastrophe of living under the heel of an administrative Czar, may forego the privilege of holding the ideas or engaging in the activities which can bring about such a condition. This is precisely the type of punishment—"coercive cruelty"—the Eighth Amendment was designed to prevent, and does prohibit.

IV. Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

It has been the well-settled law since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantee of equal protection of the laws extends not only to citizens, but to aliens as well. In the recent case of *Takahashi* v. *Fish Comm'n*, *supra*, this Court expressed the extant law to be:

> "The Fourteenth Amendment and the laws adopted under its authority * * * embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [at 420]

It has been held that the due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations—concepts which are the core of the equal protection clause. See *Detroit Bank* v. *United States*, 317

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U. S. 329 (1943); *Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Carleton Screw Products Co.* v. *Fleming,* 126 F. 2d 537 (C. C. A. 8th, 1942), *cert. den.* 317 U. S. 634; *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (Em. Ct. App., 1945), *cert. den.* 324 U. S. 865.

A fortiori, the Fifth Amendment, just as the Fourteenth, constitutes a protection for the alien from statutes which impose upon him, by reason of alienage alone, certain burdens. *Wong Wing* v. *United States, supra.* Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States, renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what non-citizens shall be permitted to remain within our borders." *Carlson* v. *Landon, supra* at 534. The power to detain, or, instead, to impose regulations on conduct to insure the deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon, supra* at 538. Where, as has already been demonstrated, the power to deport ceases or is rendered ineffectual, constitutional authority to exercise the powers over the alien, incidental to deportation, ceases. By the terms of Section 1252, the authority to detain, or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation. The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is legally resident in the United States, until such time as he can be deported, and a beneficiary of the rights guaranteed by the Constitution to all people within our borders.

Section 1252(d) seeks to impose upon the alien whose deportation cannot be effectuated within the six months period, a series of requirements and restrictions, unrelated to the deportation or effectuation of the deportation of the alien. The controls sought to be imposed by Section

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1252(d) relate rather to control of the conduct deemed "undesirable." The regulations of conduct, activity or association authorized by the statute on its face and, more specifically as applied here, neither this law, nor any other, prescribes for a citizen.

There is little question that the character of conduct, activity and association included in the 17 categories of aliens legislatively declared undesirable [8 U. S. C. A. §1251] would be and is considered equally undesirable on the part of citizens. This is evidenced by the fact, certainly as to the conduct which it has been found rendered the appellants deportable, of the existence of penal statutes proscribing such conduct. *See*: *e.g.* 18 U. S. C. A. §2385; 50 U. S. C. A. §783.

The conduct, activity, or association rendering aliens "undesirable" and deportable, therefore, cannot reasonably set such aliens apart from citizens engaged in the same allegedly "undesirable" conduct, activity, or association, in terms of the control of such activities. No more harm results to the nation from one than the other. *See*: *Wong Wing* v. *United States, supra.* Both are subject to the same penal sanctions designed to safeguard the society and the nation. In *United States ex rel. Mezei* v. *Shaughnessy, supra,* the Court of Appeals for the Second Circuit stated:

> "* * * we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; the speedy indictment and trial of actual crime in the courts still obtain." [at 969]

The burdens imposed by Section 1252(d), on its face and as applied here, upon aliens, is, patently, by reason of alien-

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age alone. Clearly then, the statute which authorizes the imposition of these regulations, the rules promulgated thereunder, and the "Orders of Supervision" issued in alleged pursuance thereof, deprive the appellants of the equal protection of the laws in violation of the Fifth Amendment.

V. Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(a) Section 1252(d) is an unlawful delegation of power.

Section 1252(d) commends "any alien" against whom a final administrative order of deportation has been outstanding for more than six months, to the supervision of the Attorney General under regulations prescribed by him.

For such a delegation of power to be constitutionally valid under Article 1, Section 1 of the Constitution, the statute must declare a guiding "policy", or establish a "rule", or an "intelligible principle", or such policy, rule or principle must be found in the "purpose of the act, its factual background and the statutory context in which they appear." *United States ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537, 543 (1950); *Lichter* v. *United States*, 334 U. S. 742, 785 (1948); *American Power & Light Co.* v. *Securities & Exch. Comm'n*, 329 U. S. 90, 104-5 (1946); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935).

The section itself establishes no policy or rule or principle to limit or guide the Attorney General in framing regulations which constitute his supervision of aliens. Although subsections (1), (2) and (3) of Section 1252(d) appear to direct, specifically, the character of certain supervisory

regulations, subsection (4), which requires an alien "to conform to such reasonable written restriction on his conduct and activity as are prescribed by the Attorney General," invests the Attorney General with an unlimited and undefined power, not only to regulate beyond the specific prescription of subsections (1), (2), and (3), but as to any other matter he may choose.

While it has been said that the Congressional purpose in deportation laws, at least as to alleged Communist aliens, in terms of securing their expulsion and protecting American society from such activity on their part pending deportation, provides an adequate statutory guide [*See*: *Carlson* v. *Landon, supra* at 543-4], it is clear from the terms and provisions of Section 1252(d) that this standard is obviously not intended to be the guide to the administrative discretion to be exercised under Section 1252(d).

Subsection (3), for instance, requires an alien to submit to interrogation, not only as to his "nationality, circumstances, habits, associations, and activities," but, as well, concerning "such other information, *whether or not related to the foregoing.*" (Emphasis added.) The delegation of power to demand information, thus unrelated, grants to the Attorney General a roving commission. No corner of an alien's mind, no idea, no belief, no thought, is free from administrative scrutiny. No business activity, political activity, or personal activity is free of the power to interrogate. No association, no matter how innocent, licit, or personal, is protected by the right to privacy.

It is difficult to understand, on the face of it, the relationship between the requirement that *any and every* deportable alien be required to subject himself, under subsection (2), to medical and psychiatric examination, and the eventual effectuation of his deportation or the protection of the community pending it. As to mental defec-

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tives or prostitutes, perhaps a relationship exists. But why as to Communists? And how frequent an examination is needed to protect the community? Once a week? Every day? Twice a day? Must the alien be ill? Or may he be subjected to examination even if well? There is no guide provided in the statute to direct the Attorney General, or to prevent him from converting this subsection into an instrument of harassment or oppression.

In the instant case, under subsection (1), the appellants are required to appear personally, a condition, which, as to some creates a severe physical hardship, and as to all a serious interference with lawful, gainful occupations. Yet, under the terms of the subsection, the Attorney General may require daily reporting, which would render it impossible to retain any job. For the statute sets no standard for how much "identification" is necessary to insure the alien's deportation or to "protect" the community until the alien may be deported.

Subsection (4) is a *carte blanche.* The Attorney General, under it, may, without restriction, control the alien's life. Here, many of the "Orders of Supervision" limit travel to a 50 mile radius from Times Square. Under the statute, the Attorney General is as free to make it 10 miles, or to confine the alien to his own home and yard. Is the Communist less of a "menace" in the Times Square area than on the eastern shore of Maryland or on the Connecticut Sound? Or perhaps is there greater safety in some American-created Siberia?

Here some of the appellants are required to discontinue their membership in the Communist Party, although to do that, would mean the loss of their lawful jobs, their only source of income. If this may be accomplished thus indirectly, has the Attorney General not the power to order that they resign other lawful jobs or forfeit other financial benefits? And has he not as well the power to order them

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to resign from the American Legion, the Catholic Church, the National Association for the Advancement of Colored People? He has ordered the appellants to cease their associations with other Communists, although some of them must continue such associations to maintain lawful occupations or would desire to continue such associations to extend lawful social relations, many of long standing. If this may be accomplished thus indirectly, is the appellee not free to order them to stop association with all other Americans, on the "germ" theory of the spread of Communism and thus place the appellants in virtual solitary confinement within their 50 mile circle?

By virtue of the delegation granted by Section 1252(d), to control the lives of and restrict the liberty of aliens—violation constituting a felony bearing criminal penalty—the Attorney General has been given a free hand. In fact, by virtue of the criminal penalty, he has been given power to legislate a series of crimes, for conduct or activity, which is not otherwise, and, in some instances, could not be made criminal.

The "Orders of Supervision" here were made in alleged pursuance of such an unlawful delegation of power. The "Orders" and the statute must, therefore, be declared invalid and void and in violation of Article 1, Section 1 of the United States Constitution.

(b) 8 C. F. R. §242.3(c) is an unlawful re-delegation of legislative power.

The unrestricted power granted by Section 1252(d) has been unrestrictedly re-delegated by the Attorney General, under 8 C. F. R. §242.3(c) to the "district director, district enforcement officer, or officer in charge, having administrative jurisdiction over the office in which the detention or release of [the] alien was authorized," although the statute placed the power in the Attorney General him-

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self. Even in a situation in which no specific rule authorized such a delegation, Justice BLACK, dissenting in *Carlson* v. *Landon, supra,* questioned the constitutionality of such a delegation. He stated:

> "It is bad enough to read an Act as vesting even the Nation's chief prosecutor with power to determine what individuals he prosecutes should be held in jail without bail. Delegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions. I am not willing to imply that Congress has granted power to make such delegations which so ominously threaten the liberty of individuals." [at 554]

(c) The supervisory conditions imposed here are a usurpation of a legislative power.

It is well settled that: "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter,* 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Products Corp.,* 315 U. S. 475, 489 (1942).

(1) *As to Paragraphs 6 and 7 of the "Orders of Supervision"*

Section 4(f) of the Internal Security Act of 1950 [50 U. S. C. A. §783(f)] provides:

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> "Neither the holding of office nor membership in any Communist organization shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

Yet paragraphs 6 and 7 of the "Orders of Supervision" [in some instances 5-a and 5-b] proscribe membership in the Communist Party and its "affiliates". Violations of the proscriptions of paragraphs 6 and 7 become subject to the criminal penalties provided by Section 1252(d). The action of the appellee, therefore, in incorporating paragraphs 6 and 7 in the "Orders" "has the effect to subject * * * persons to fines and penalties under the act, that are excluded therefrom, by the terms of" the Internal Security Act of 1950.

Clearly this assumption of power by the administrative officer, contrary to the express policy and provision of Congress, is a usurpation of Congress' legislative function, in violation of Article 1, Section 1 of the Constitution.

(2) *As to paragraph 8 of the "Orders of Supervision"*

Paragraph 8 of the "Orders of Supervision" [in some instances 5-c] direct that the alien:

> "* * * shall not violate sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Sec. 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

Section 2385 of the "Smith" Act provides that as the penalty for its violation, the convict:

> "Shall be fined not more than $10,000 or imprisonment not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

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The penalty section of Section 4 of the Internal Security Act provides:

> "Any person who violates any provision of this section, shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Clearly it was the design of Congress that *these* should be the penalties for violating either law. The inclusion of a further prohibition against their violation in the "Orders of Supervision"—an obvious redundancy in light of the existence of the statutes—has the effect, only, of increasing the penalties for their violation by applying to such violation the additional criminal penalties of Section 1252(d): namely, an additional year's imprisonment and fine of an additional $1,000.

Of such administrative action, this Court said in *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 404 (1944):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey,* 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599; *Wallace* v. *Cutten, supra,* [298 U. S. 229]."

Paragraph 8 is, therefore, manifestly a violation of Article 1, Section 1 of the United States Constitution.

VI. Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States.

A statute which, on its face and as applied, is so vague and indefinite, as to permit within its scope its administrators and enforcers, to burden, prohibit or make criminal, conduct and belief which are constitutionally permissible and protected, violates the Fifth Amendment and, as well, the constitutional provision protective of the exercise of such conduct or the holding of such belief. *Winters* v. *New York*, 333 U. S. 507 (1948); *Herndon* v. *Lowery*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

(a) As to Subsection (4).

Subsection (4) of Section 1252(d), in according to the Attorney General an undefined latitude to impose "written restrictions on [the alien's] conduct and activity," and in making criminal their violation, is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York, supra* at 509. An alien, whether deportable or not, while in residence here is entitled the guarantees of freedom of speech, press and association protected by the First Amendment. *Bridges* v. *Wixon, supra; see*: *Chew* v. *Colding, supra.*

The statute, as applied in the instant case by the "Orders of Supervision," does in fact create restrictions upon the conduct of the appellants which deprive them of First Amendment rights. The "Orders of Supervision" command each of the appellants, with minor deviations in some instances, to:

> "* * * terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Com-

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munist Political Association, the Communist Party of any state, or of any foreign state, or any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization."

"* * * refrain from associating with any person, knowing or having reasonable ground to believe that such a person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in [the above] Paragraph."

The mere statement of these blanket prohibitions is adequate to demonstrate that they are the type of ban that is prohibited by the First Amendment's guarantees of freedom of speech, press and assembly. *American Communications Association* v. *Douds, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931). The Communist Party has never been declared illegal, nor membership in it or association with it, *per se,* a crime. *See*: *Rogers* v. *United States,* 340 U. S. 367, 372 (1951). On the contrary, mere membership has been statutorily declared not to be a crime. [50 U. S. C. §783(f)]. Nor has every policy or doctrine attributed to the Communist Party been declared—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. *See*: *Jamison* v. *Texas,* 318 U. S. 413 (1943).

Furthermore, the language of the prohibitions referred to above is so vague and indefinite as to make it impossible for the appellants to ascertain what it is they must or may not do, under criminal penalty, in violation of their rights under the Fifth Amendment. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const. Co.,* 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921).

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What is to be deemed "support" of doctrines and policies of the Communist Party? Does it mean public speech making? Or does it prohibit, as well, approval expressed over the dinner table to friends or neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed? Does it mean working, for pay, for such an organization, whether as a file clerk or as a director?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines and policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine or policy adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"?

What is to be deemed an "affiliate" of the Communist Party, from which the appellants must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Party, or of the Communist Parties of the various states, or political or geographical subdivisions of the states, or of the various foreign countries. *See*: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123

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(1951). Will the appellee deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom shall the appellants refrain from associating? What is meant by "associating" under this paragraph? Does it mean "associating" in the Communist Party? Or does it mean that they shall not pass the time of day with a Communist on a street corner? Does it mean that, in the course of legitimate work, they may not speak to a Communist in connection with it? May they not invite Communists to their homes for a social Saturday evening? Must they forsake life-long friends who may be Communists?

What is "reasonable ground to believe" that a person is a Communist? Must the appellants become insurers of the political probity of each person that they meet? Is there a burden on the appellants to inquire of people if they are Communists? If the answer is: "No," are the appellants entitled to believe the answer, or must they investigate the truth of it? How are the appellants to know whether such a person is engaged in the "promotion of any of the activities" mentioned in the "Orders of Supervision" when it is all but impossible to ascertain what "activities" are referred to or what "affiliations"?

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the appellants must make such determinations at the risk of criminal indictment. As this Court recently said in *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what per-

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> sons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

By virtue of the undefined latitude of subsection (4) of Section 1252(d), the Attorney General, in the "Orders of Supervision," deprives the appellants of the liberty—without due process of law—to travel beyond a radius of 50 miles from Times Square. Such restrictions on freedom of movement have been held to be deprivations of liberty in violation of the Fifth Amendment. See: *Williams* v. *Fears, supra; Allgeyer* v. *Louisiana, supra; Bauer* v. *Acheson, supra.*

Similarly, the indefiniteness of subsection (4) has enabled the appellee to impose the condition, contained in paragraph 3-b of the "Orders of Supervision", that the appellants may not change their places of residence without the express permission of the Immigration Service, to be granted or withheld in its apparently unrestricted discretion. Not only does this condition constitute the same type of deprivation of liberty as the 50-mile travel restriction, but it has been and may, as well, be applied to frustrate a removal of residence designed by the appellants in aid of their employment, or to secure or better their livelihoods—property rights which accrue to them under the constitution. *See*: *Takahashi* v. *Fish Comm'n, supra.*

(b) As to Subsection (3).

Subsection (3) of Section 1252(d) authorizes the Attorney General to, and by paragraph 2 of the "Orders of Supervision" he requires the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, whether or not related to the foregoing as the Attorney General may deem fit and proper." Failure to comply with such a direction renders the alien subject to the criminal penalties of Section 1252(d).

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The courts have held that aliens are entitled, even in a pending deportation proceeding, to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment. *Schoeps* v. *Carmichael*, 177 F. 2d 391, 400 (C. A. 9th, 1949), *cert. den.* 339 U. S. 914; *United States ex rel Mezei* v. *Shaughnessy, supra* at 968. The language of the instant statute, on its face and as applied here, is broad enough to permit the interrogation on subject matters and compel responses, under threat of criminal penalty, concerning matters which may tend to incriminate the alien within the meaning of the Fifth Amendment. Such statutory compulsion renders a statute violative of the self-incrimination clause of the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Smith* v. *United States*, 337 U. S. 137 (1949). The language of 1252(d), which is so broad as to encompass such compulsion, renders Section 1252(d) void in violation of the Fifth Amendment. *Cf. Winters* v. *New York, supra.*

(c) As to Subsections (1) and (2).

Subsections (1) and (2) of Section 1252(d), requiring appearance for identification "from time to time" and for medical and psychiatric examination "when necessary" are so indefinite in their direction, as to permit the Attorney General to convert those requirements into means of depriving an alien of his liberty or property.

"From time to time," or "when necessary" is not a limitation, but an absence of limitation. The Attorney General is free to compel an alien to appear daily or twice or three times a day, making such appearances a virtual substitute for physical detention. This reporting may become so frequent as to make the strain of it a serious threat to the alien's health, or so time-consuming as to make it impossible for an alien to retain a job to support himself or his family. In the instant cases, it seriously affects both aspects of the appellants' lives.

Such an undefined grant of power cannot be squared with the Fifth Amendment.

VII. The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power.

Section 1252(d) requires that the restrictions imposed by the Attorney General on the conduct or activity of the alien be "reasonable". Each of the appellants, in his complaint and affidavit in support of his motion for temporary relief, has set forth facts to establish that, as to each of them, the regulations of and restrictions upon his conduct are unreasonable and an abuse of power. It is submitted that, even assuming *arguendo* the constitutional validity of Section 1252(d) and the provisions of the "Orders of Supervision," the "Orders," being unreasonable, are illegal and should not be enforced.

CONCLUSION

Plenary consideration of this appeal should be afforded to the appellants and the decision of the court below reversed.

Respectfully submitted,

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Appellants.

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APPENDIX

Opinion of Statutory Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285, 93-286, 93-287, 93-288, 93-289, 93-290, 93-291, 93-292, 93-293, 93-294, 93-228

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Civ. No. 87-98, 87-99, 87-124

BETTY GANNET, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Before: MEDINA, Circuit Judge, and
McGOHEY and WEINFELD, District Judges.

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Opinion of Statutory Court

BLANCH FREEDMAN & GLORIA AGRIN, Attorneys for Plaintiffs.

J. EDWARD LUMBARD, United States Attorney, Attorney for Defendant; HAROLD R. TYLER, JR., HAROLD J. RABY, Assistant United States Attorneys and LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service, of Counsel.

MEDINA, Circuit Judge:

The pleadings and issues in the fourteen actions before us are substantially the same. Each of the plaintiffs is an alien who has been ordered deported from the United States after appropriate administrative proceedings which none has sought to review by any judicial proceeding. The order of deportation in each case was based on an administrative finding that, after entering the United States, the plaintiff had been a member of the Communist Party of the United States. Final orders and warrants for the deportation of each of the plaintiffs have been outstanding for more than six months.

Three of the plaintiffs, namely, Gannet, Bittleman and Jones, have not been deported primarily because they were tried and convicted of violations of the penal provisions of the Smith Act for conspiring to advocate the overthrow of the United States Government by force and violence. These plaintiffs have been sentenced to various terms of imprisonment and are now at liberty on judicial bond pending their appeals in the criminal action. With respect to the other eleven plaintiffs, they have not been deported by reason of the inability of the immigration authorities physically to effectuate deportation. Some of the plaintiffs are so-called "stateless persons"; others have been denied, temporarily at least, readmittance to the countries of their nativity or last residence prior to coming to the United States.

Since more than six months have elapsed from the entry of the final orders of deportation, the defendant has released the plaintiffs from custody on supervised parole in accordance with the express provisions of Section 242(d) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252(d),[1] and the regulations promulgated thereunder, 8 C. F. R. §242.3(c),[2] the constitutionality of which plaintiffs now seek to attack.

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1. Section 242(d) of the Immigration and Nationality Act of 1942, 8 U. S. C. §1252(d), provides as follows:

"(d) *Supervision of deportable alien; violation by alien.*

Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

2. 8 C. F. R. §242.3(c) provides as follows:

"(c) *Release; supervision after six months' period has expired; warning of penal provisions.*

[continued on page 58]

As may be seen, the regulations which have been promulgated under Section 242(d) of the Immigration and Nationality Act of 1952 closely follow the statutory language. Likewise, the orders of supervision pursuant to which the plaintiffs were released from custody on supervised parole substantially follow the language of the statute and the regulations, with the exception of certain restrictions with respect to plaintiffs' activities.[3] Although all of the plain-

[continued from page 57]

An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

3. The orders of supervision regulated and restricted the conduct and activity of each of the plaintiffs substantially as follows:

"THEREFORE, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitt-

[continued on page 59]

tiffs have been notified by the defendant of the conditions of their parole under Section 242(d), they have refused to sign the written orders of supervision, copies of which are attached to their respective complaints.

Since the time of the plaintiffs' release from the custody of the defendant on supervised parole, no action of any

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[continued from page 58]

ing to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) on Thursday of each week, bet. 8:45 A.M. & 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

(5)(a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from 'associating' with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the

[continued on page 60]

kind with respect to any of the plaintiffs has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action.

Following the issuance of the orders of supervision, the plaintiffs commenced these actions in this Court, each respectively seeking a declaratory judgment and injunctive relief. The complaints ask that a declaratory judgment be made and entered declaring that Section 242(d) of the Immigration and Nationality Act of 1952, the regulations promulgated thereunder, and the orders of supervision issued against the plaintiffs, are all "unconstitutional, invalid, illegal, void and inoperative," and declaring that the particular provisions of the orders of supervision "are unreasonable and an abuse of discretion." The complaints further demand that an order be made and entered directing the defendant to set aside and cancel the orders of supervision, and that the defendant be enjoined from re-

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[continued from page 59]

term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of 50 miles from Times Square, New York, N. Y. without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District."

The orders of supervision vary in certain unimportant respects, *e.g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted.

quiring the plaintiffs to obey the conditions of their supervised parole as contained in the orders of supervision.

The plaintiffs have moved, by means of orders to show cause issued at the same time the various complaints were filed, for temporary injunctions against the defendant pending the hearing and determination of the actions. In all cases, temporary restraining orders were issued by single judges of this Court, relieving plaintiffs from any obligation of compliance with the varying provisions of the orders of supervision, pending the hearing and determination of the plaintiffs' motions for temporary injunctions.

The defendant has cross-moved with respect to all fourteen complaints, asking the Court for an order (1) dismissing all of the complaints herein, pursuant to Rule 12(b) of the Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving the temporary restraining orders herein pursuant to Rule 65(b) of the Rules of Civil Procedure and Title 28, United States Code, Section 2284(3); and (3) appointing a three-judge Court, in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, to hear and determine the matters herein in issue.

The plaintiffs' attorneys offered no opposition to the defendant's application for the appointment of a three-judge Court, and, accordingly, on June 21, 1954, this statutory Court was designated in accordance with the appropriate provisions of Title 28, United States Code, Section 2284. All of these actions, including the various motions, were heard together on June 30, 1954, pursuant to orders of this Court, dated June 21, 1954, and June 23, 1954, respectively, and extensive arguments were made by counsel for both sides. On July 27, 1954, the temporary restraining orders referred to above were modified in certain similar respects by an order of this Court, and, as so modified,

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continue to be outstanding against the defendant in all the cases.

The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate;[4] and it has long been settled law that the constitutional powers of the federal courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do.

The District Director is a subordinate official who has no power to take any further action with respect to these plaintiffs beyond what he has already done. His authority ceased with the issuance of the orders of supervision and the release of plaintiffs from custody on supervised parole. Nor is it claimed or alleged in any of the complaints that the District Director has in any manner threatened to take further action against plaintiffs or any of them. Nowhere is it alleged that any of the plaintiffs has violated the terms of the statute under attack. A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine. Thus if they refuse to comply with the conditions of their parole, it is the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted. For aught that now appears there may be no actual prosecution of any of these plaintiffs, and the factual background indispensable to the determination of any such prosecution, should it take place, is in futuro and as yet non-existent.

The principle involved here is, in substance, the same as that reaffirmed by the Supreme Court in *United Public*

4. *Massachusetts* v. *Missouri*, 308 U. S. 1, 17 (1939); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272 (1941).

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Workers of America (C.I.O.) v. *Mitchell*, 330 U. S. 75 (1947). There, certain employees of the executive branch of the Federal Government and a union of such employees sued to enjoin the members of the Civil Service Commission from enforcing the provision of Section 9(a) of the Hatch Act which forbade such employees to take "any active part in political management or in political campaigns" and for a declaratory judgment holding the Act unconstitutional. In denying declaratory relief to all but one of the employees, on the ground that they had failed to present a justiciable controversy, the Court pointed out that these employees did not allege that they had violated the Act, or that the Commission had actually threatened to interfere with their rights, but only that they desired to engage in acts of political management and in political campaigns and understood that if they engaged in this activity the Commission would order their dismissal from federal employment. A consideration of these factors compelled the Court to conclude that these employees "seem[ed] clearly to seek advisory opinions" as to whether or not they could "act contrary to the rule against political activity." As to these employees, the Court stated (pp. 89-90):

> "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. * * * [T]he facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy.
>
> * * *

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The Court decided that one employee, Poole, was entitled to a declaratory judgment, as his suit presented a justiciable controversy. In so deciding, the Court pointed out that Poole admitted that he had violated the Act, that he had been charged by the Commission with political activity, and that a proposed order for his removal had been issued by the Commission subject to his right to reply to the charges and to present further evidence in refutation.

Here, the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for reasonable debate, as defendant is not now nor will he ever be charged with the duty of enforcing this criminal statute.

Accordingly, the complaints are dismissed, plaintiffs' motions denied, and the temporary restraining orders vacated.

Dated: October 11th, 1954.

HAROLD R. MEDINA
United States Circuit Judge

JOHN F. X. MCGOHEY
United States District Judge

EDWARD WEINFELD
United States District Judge

limited time after, by statute—the same statute—the power to detain to make "arrangements" for deportation, has ended.

These powers transcend the political power of the government to deport and to restrain or regulate as an "incident" to deportation. Since the conditions and restrictions which Section 1252(d) prescribes be placed upon an alien's liberty and property may, under the terms of Section 1252(d), be imposed without resort to "those indicia of legal procedure that are embedded in the constitution as the right of all men," they constitute an illegal and unconstitutional deprivation of the alien's liberty and property. The statute, in that it authorizes such deprivations, violates, on its face, the due process provision of the Fifth Amendment.

In *Wong Wing* v. *United States, supra*, this Court clearly determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and, constituted a violation of the Fifth Amendment. The Court struck down the "Geary Act" [Section 4, Act of May 5, 1892] as a transgression of the Fifth Amendment, for authorizing a year's imprisonment for Chinese aliens found, without judicial trials, to be in this country unlawfully. It held that Congress cannot "promote its policy in respect to Chinese persons by adding to its provisions for their expulsion and exclusion punishment by imprisonment at hard labour", inflicted without judicial trial. *Id.* at 235.

The rationale of the Court relating to the Geary Act is clearly applicable to Section 1252(d), which is its analogue. The Geary Act, in the view of the Court, without judicial trial, deprived Chinese aliens of liberty by authorizing their imprisonment for a year. Section 1252(d) similarly seeks, without judicial trial, to deprive aliens of liberty

and property by subjecting them to supervision which does and may further circumscribe their movements, restrict and impair their normal living and their right to work for an unlimited period of time—conceivably as long as they may live or until their departure from the United States can be effected. "Liberty" is not restricted in its import to freedom from imprisonment. This Court, in its recent decision, *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) ruled:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * * "

See also: *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897); *Bauer* v. *Acheson*, 106 F. S. 445, 450 (D. C. D. C. 1952).

That the power to deport does not, as well, include the right, without judicial trial, to restrict and impair freedom, liberty and property rights of aliens, although short of actual imprisonment, was sharply enunciated by Circuit Judge ANDERSON in *Petition of Brooks, supra.* The order of deportation against the alien in that case, concededly, could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge ANDERSON rejected this contention as unlawful and pointed out:

> "He is entitled to be deported or to have his freedom * * * any further detention by the Immigration authorities *or control of* [*the alien's*] *freedom is illegal.*" [at 235, 240] (Emphasis added.)

The conditions circumscribing and restricting the lives and livelihoods of the instant appellants, authorized by the

statute and imposed by the appellee, are such a "control of [their] freedom" as to render illega' both the statute, the regulation and the "Orders of Supervision" requiring the appellants to conform to the conditions.

Subjection to "supervision" is itself a "control of freedom" of far greater consequence than the control by bond in *Petition of Brooks, supra.* The statute here, moreover, requires and the "Orders of Supervision" direct the appellants to report to an officer of the Immigration and Naturalization Service, a restriction of freedom disapproved in *Petition of Brooks, supra.* The requirement that the appellants appear for medical or psychiatric examination is clearly of the same nature. The requirements of some of the appellants that they remain within a 50 mile radius of Times Square and remain residents of the Third Immigration District, unless with express permission of the appellee to be granted or withheld in his unrestricted discretion, are clearly deprivations of their liberty. In *Williams* v. *Fears, supra,* this Court declared:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the constitution." [at 274]

Accord: *Bauer* v. *Acheson, supra; Walker* v. *Chief Quarantine Officer,* 69 F. S. 980, 983 (D. C. D. Canal Zone Div. 1943).

The appellants are required to relinquish membership in the Communist Party—not in itself illegal; cease all support of, and all activities on behalf of all policies and doctrines of the Communist Party and its "affiliates"—whether legal or not; end their association with all members of the Communist Party or its affiliates, whether political in character, social or business, innocent or otherwise; to supply any and all information regardless of con-

stitutional or common law privilege. The right to be free of such restrictions is a right accorded to aliens, and is undeniable, even after "judicial trial," as an infringement of First Amendment rights.

The "supervision" authorized by the statute is of such a latitude that it may be employed to—and in fact has—affect or deprive the appellants of their jobs and livelihoods, a property right which is theirs under the Constitution. *See: Takahashi* v. *Fish Comm'n,* 334 U. S. 410 (1948) and cases cited therein.

The deprivation of the rights and liberties authorized by Section 1252(d) and accomplished here by the "Orders of Supervision", under circumstances where the exercise of the power to deprive no longer rests on the power to deport or powers incidental thereto, violates the Fifth Amendment, since the restrictions on liberty and property are imposed without due process of law, but by administrative fiat.

In *Carlson* v. *Landon, supra,* the approval of the exercise of discretion to detain, based on the statutory criterion that detention would serve to eliminate an arrested alien's "opportunity to hurt the United States," hinged on the incidental power to detain *pending determination of deportability,* an area within the plenary power of Congress to expel, apparently, under the *Carlson* case, without let or hindrance from the Fifth Amendment. The rationale of the *Carlson* case is inapplicable here. In the instant cases, the deportation proceedings are completely at an end, and deportation has become "patently impossible" for an unforseeable period of time. The Congress may not "promote its policy" to protect the United States from the alleged activities which allegedly render an alien undesirable, "by adding to its provision for their expulsion and exclusion" deprivations of life, liberty and property without judicial trial. *Wong Wing* v. *United States, supra.*

There exist still in the nation, for its protection, investigative agencies, criminal statutes, and "the speedy indictment and trial of actual crime in the courts." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 969. No other mode may be adopted consonant with constitutional due process.

III. Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth and Eighth Amendments to the United States Constitution.

(a) Section 1252(d) inflicts punishment without due process of law in violation of the Fifth Amendment.

In *Cummings* v. *Missouri*, 71 U. S. 277, 320 (1866), this Court established the proposition that:

> "The deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact. * * *"

The statute in question here permits the deprivation of, and the "Orders of Supervision" made against the appellants, deprive them of liberty, and rights—civil, political and property. In the circumstances under which these seemingly civil disabilities are authorized and were applied here, they constitute punishment. *See also*: *Ex parte Garland*, 71 U. S. 333 (1866); *Pierce* v. *Carskadon*, 83 U. S. 234 (1872); *Burgess* v. *Salmon*, 97 U. S. 381 (1878); *Harisiades* v. *Shaughnessy, supra*. The single "circumstance" that will render a civil disability a penalty or a punishment, is the absence of a reasonable relation to the power which the civil disability is intended to aid. *Cummings* v. *Missouri, supra* at 319-20.

Congress has, concededly, the plenary power to deport aliens it deems undesirable. As an incident to this power,

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it may authorize the control or the restriction of an alien's liberty pending deportation and while arrangements are being made for the actual deportation, on criteria which it deems fit, including its evaluation of the effect of the alien's freedom upon the welfare of the nation. [*See*: *Carlson* v. *Landon, supra*]. The power to employ such a criterion, as a basis for detention or control, ends when the power to detain or control ends: with the termination of the proceeding to deport and at that time when "deportation becomes patently impossible." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 967; *Wong Wing* v. *United States, supra.*

The power to "supervise" granted by Section 1252(d) and the "supervisory" power exercised over these appellants, have no reasonable relation to the exercise of any of the powers which Congress may exercise or authorize over deportation and the deportable alien. It is possible to see, from an analysis of the "Orders of Supervision" this lack of relation, which displays, as the oath in the *Cummings* case, *supra,* the punitive purport of the "Orders":

> "It was required to reach the person, not the calling. It was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." [at 320]

That the statute was not intended to be directed at control of the alien pending the conclusion of deportation proceedings, is patent from the fact that Section 1252(d) does not become applicable until six months after the final conclusion of a deportation proceeding. It is likewise clear that it is not a temporary control while arrangements are

being made for deportation, for it is precisely the impossibility of effecting deportation within the prior six months that juvenates the power to supervise under Section 1252(d). And it comes into effect after that period during which the determination as to whether to control or not to control the liberty of the alien may be made on the basis of an evaluation that it is necessary for the welfare of the nation.

Nor can it be said that the statute or the "Orders of Supervision" are related to a power, perhaps inherent in the power to deport: to insure the capacity to deport and to avoid the frustration of that power. The disabilities imposed by the "Orders of Supervision" which most clearly indicate the punitive character of all of the disabilities, even those innocent on their face, appear in paragraphs 6 and 7 of the "Orders". [In some instances, the paragraph numbers are 5-a and 5-b.]

Paragraph 6 commands the appellants to terminate their membership in the Communist Party and its "affiliates" and their support and activity in behalf of the doctrines and policies of both. Paragraph 7 requires that the appellants refrain from any, or any type of association with members of the Communist Party and its "affiliates" or persons who support the doctrines or policies of either.

It is clear that mere membership in the Communist Party is not a crime. *See*: *Rogers* v. *United States*, 340 U. S. 367, 372, ftn. 12 (1951); 50 U. S. C. A. §783(f). It must, therefore, necessarily be so that other or different "associations" between Communists may be equally innocent. Nor has every policy or doctrine of the Communist Party been declared—even by the courts—to be unlawful [*United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2d, 1950)], nor in fact, may they be made so. *See*: *Jamison* v. *Texas*, 318 U. S. 413 (1943). Paragraph 6 and 7 of the "Orders of

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Supervision" deprive the appellants of their rights to these legal associations, to income which accrues to some of them as a result of these legal associations, and punishes a breach of the inhibitions against those associations by criminal penalties. Of these paragraphs, propounded under the aegis of Section 1252(d), it may be truly said, as in the *Cummings* case: "* * * it was thought that the several acts deserved punishment, and * * * there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

The remaining paragraphs of the "Orders" establish, as a substitute for the jail to which these appellants may not be sent, a system of police surveillance over their lives that differs only in degree, but not in kind, from imprisonment, and is, in fact, in the nature of a house arrest. They are limited in their travel area and their unrestricted choice of residence. They must report in person. Subsection (3) of the statute and paragraph 2 of the "Orders", providing for physical and mental examination and sweeping unlimited interrogatories, subject the appellants, as Justice BLACK, for the majority, stated in *Hines* v. *Davidowitz*, 312 U. S. 52, 71 (1941): "to a system of indiscriminate questioning similar to the espionage systems existing in other lands." An innocent purpose is not to be attributed to these regulations. They are not needed here to insure the deportation of these appellants. The "Orders" require that the appellants appear for deportation, when it can be effected [Paragraph (1)]. Their whereabouts are constantly known to the government by virtue of their alien registration, pursuant to 8 U. S. C. A. §1302, and changes in their residence must also be made known, and have been. These appellants, heretofore, have met their legal obligations to appear at all times when they might have been legally summoned.

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Section 1252(d) authorizes, and the "Orders" herein provide a substitute for prison and penalties. They are punishment. Inflicted without due process of law, and solely by administrative fiat, they are in violation of the Fifth Amendment.

(b) Section 1252(d) inflicts cruel and unusual punishment in violation of the Eighth Amendment.

The Eighth Amendment, by its terms, prohibits the infliction of "cruel and unusual punishments." It was conceived, along with the other protections of the Bill of Rights, as a stricture against tyrannical encroachment upon the democratic rights of the people. 2 Story, *Commentaries on the Constitution* (5th Ed., 1891), Sec. 1903; Whalen, *Punishment for Crime: The Supreme Court and the Constitution,* 35 Minn. L. Rev. 109, 111 (1951); 3 *Elliott's Debates* 447, 448. Its initial purport may have been adumbrated by the long course of its usual employment as a protection against inhuman, barbarous or torturous punishment, or the "wanton infliction of pain." See: *Louisiana* v. *Resweber,* 329 U. S. 459 (1947). Yet the force of its original conception has not been lost to this Court. In *Weems* v. *United States,* 217 U. S. 349, 372-3 (1910), it stated:

> "* * * Surely they [authors of the Amendment] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprison-

> ment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. *We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty', because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny*; of zeal for a purpose, either honest or sinister." (Emphasis added.)

In its most profound import, therefore, the Amendment's prohibitions are recognized to fall upon punishment whose imposition is designed to, or which tends to enforce, or which has the effect of enforcing, political conformity to the concepts of the sovereign. The kind, character and degree of punishment must be measured, case by case, against the yardstick of its power to bring about this illegitimate end. *See*: *Weems* v. *United States, supra; United States* v. *Ragen*, 54 F. Supp. 973 (D. C. N. D. Ill. E. D. 1944), *aff'd* 146 F. 2d 349, *cert. den.* 325 U. S. 865.

The controls on the appellants' liberty and property, authorized by Section 1252(d) and imposed by the "Orders of Supervision", constitute punishment. [*See*: *supra*, III (a)]. This punishment is of the kind whose "coercive cruelty" is such as to have the effect of enforcing political conformity and the abjuration of non-conformist, and, more particularly, Communist doctrines and policy, whether innocent or not. The punishment, quite obviously, is directed at the appellants as alleged Communists, and at their beliefs and activities. The disabilities which they

are made to suffer are extended, if not perpetual. They are prohibited from exercising their conceded constitutional rights to be and speak as Communists, if Communists they are. They are consigned to a life of police surveillance over body, mind and thought, and are put under virtual house arrest. If these oppressive conditions may be imposed on these aliens, others, to avert the catastrophe of living under the heel of an administrative Czar, may forego the privilege of holding the ideas or engaging in the activities which can bring about such a condition. This is precisely the type of punishment—"coercive cruelty"—the Eighth Amendment was designed to prevent, and does prohibit.

IV. Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

It has been the well-settled law since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantee of equal protection of the laws extends not only to citizens, but to aliens as well. In the recent case of *Takahashi* v. *Fish Comm'n*, *supra*, this Court expressed the extant law to be:

> "The Fourteenth Amendment and the laws adopted under its authority * * * embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [at 420]

It has been held that the due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations—concepts which are the core of the equal protection clause. See *Detroit Bank* v. *United States*, 317

U. S. 329 (1943); *Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Carleton Screw Products Co.* v. *Fleming,* 126 F. 2d 537 (C. C. A. 8th, 1942), *cert. den.* 317 U. S. 634; *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (Em. Ct. App., 1945), *cert. den.* 324 U. S. 865.

A fortiori, the Fifth Amendment, just as the Fourteenth, constitutes a protection for the alien from statutes which impose upon him, by reason of alienage alone, certain burdens. *Wong Wing* v. *United States, supra.* Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States, renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what non-citizens shall be permitted to remain within our borders." *Carlson* v. *Landon, supra* at 534. The power to detain, or, instead, to impose regulations on conduct to insure the deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon, supra* at 538. Where, as has already been demonstrated, the power to deport ceases or is rendered ineffectual, constitutional authority to exercise the powers over the alien, incidental to deportation, ceases. By the terms of Section 1252, the authority to detain, or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation. The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is legally resident in the United States, until such time as he can be deported, and a beneficiary of the rights guaranteed by the Constitution to all people within our borders.

Section 1252(d) seeks to impose upon the alien whose deportation cannot be effectuated within the six months period, a series of requirements and restrictions, unrelated to the deportation or effectuation of the deportation of the alien. The controls sought to be imposed by Section

1252(d) relate rather to control of the conduct deemed "undesirable." The regulations of conduct, activity or association authorized by the statute on its face and, more specifically as applied here, neither this law, nor any other, prescribes for a citizen.

There is little question that the character of conduct, activity and association included in the 17 categories of aliens legislatively declared undesirable [8 U. S. C. A. §1251] would be and is considered equally undesirable on the part of citizens. This is evidenced by the fact, certainly as to the conduct which it has been found rendered the appellants deportable, of the existence of penal statutes proscribing such conduct. *See*: *e.g.* 18 U. S. C. A. §2385; 50 U. S. C. A. §783.

The conduct, activity, or association rendering aliens "undesirable" and deportable, therefore, cannot reasonably set such aliens apart from citizens engaged in the same allegedly "undesirable" conduct, activity, or association, in terms of the control of such activities. No more harm results to the nation from one than the other. *See*: *Wong Wing* v. *United States, supra.* Both are subject to the same penal sanctions designed to safeguard the society and the nation. In *United States ex rel. Mezei* v. *Shaughnessy, supra,* the Court of Appeals for the Second Circuit stated:

> "* * * we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; the speedy indictment and trial of actual crime in the courts still obtain." [at 969]

The burdens imposed by Section 1252(d), on its face and as applied here, upon aliens, is, patently, by reason of alien-

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age alone. Clearly then, the statute which authorizes the imposition of these regulations, the rules promulgated thereunder, and the "Orders of Supervision" issued in alleged pursuance thereof, deprive the appellants of the equal protection of the laws in violation of the Fifth Amendment.

V. Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(a) Section 1252(d) is an unlawful delegation of power.

Section 1252(d) commends "any alien" against whom a final administrative order of deportation has been outstanding for more than six months, to the supervision of the Attorney General under regulations prescribed by him.

For such a delegation of power to be constitutionally valid under Article 1, Section 1 of the Constitution, the statute must declare a guiding "policy", or establish a "rule", or an "intelligible principle", or such policy, rule or principle must be found in the "purpose of the act, its factual background and the statutory context in which they appear." *United States ex rel Knauff* v. *Shaughnessy,* 338 U. S. 537, 543 (1950); *Lichter* v. *United States,* 334 U. S. 742, 785 (1948); *American Power & Light Co.* v. *Securities & Exch. Comm'n,* 329 U. S. 90, 104-5 (1946); *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935).

The section itself establishes no policy or rule or principle to limit or guide the Attorney General in framing regulations which constitute his supervision of aliens. Although subsections (1), (2) and (3) of Section 1252(d) appear to direct, specifically, the character of certain supervisory

regulations, subsection (4), which requires an alien "to conform to such reasonable written restriction on his conduct and activity as are prescribed by the Attorney General," invests the Attorney General with an unlimited and undefined power, not only to regulate beyond the specific prescription of subsections (1), (2), and (3), but as to any other matter he may choose.

While it has been said that the Congressional purpose in deportation laws, at least as to alleged Communist aliens, in terms of securing their expulsion and protecting American society from such activity on their part pending deportation, provides an adequate statutory guide [*See*: *Carlson* v. *Landon, supra* at 543-4], it is clear from the terms and provisions of Section 1252(d) that this standard is obviously not intended to be the guide to the administrative discretion to be exercised under Section 1252(d).

Subsection (3), for instance, requires an alien to submit to interrogation, not only as to his "nationality, circumstances, habits, associations, and activities," but, as well, concerning "such other information, *whether or not related to the foregoing.*" (Emphasis added.) The delegation of power to demand information, thus unrelated, grants to the Attorney General a roving commission. No corner of an alien's mind, no idea, no belief, no thought, is free from administrative scrutiny. No business activity, political activity, or personal activity is free of the power to interrogate. No association, no matter how innocent, licit, or personal, is protected by the right to privacy.

It is difficult to understand, on the face of it, the relationship between the requirement that *any and every* deportable alien be required to subject himself, under subsection (2), to medical and psychiatric examination, and the eventual effectuation of his deportation or the protection of the community pending it. As to mental defec-

tives or prostitutes, perhaps a relationship exists. But why as to Communists? And how frequent an examination is needed to protect the community? Once a week? Every day? Twice a day? Must the alien be ill? Or may he be subjected to examination even if well? There is no guide provided in the statute to direct the Attorney General, or to prevent him from converting this subsection into an instrument of harassment or oppression.

In the instant case, under subsection (1), the appellants are required to appear personally, a condition, which, as to some creates a severe physical hardship, and as to all a serious interference with lawful, gainful occupations. Yet, under the terms of the subsection, the Attorney General may require daily reporting, which would render it impossible to retain any job. For the statute sets no standard for how much "identification" is necessary to insure the alien's deportation or to "protect" the community until the alien may be deported.

Subsection (4) is a *carte blanche.* The Attorney General, under it, may, without restriction, control the alien's life. Here, many of the "Orders of Supervision" limit travel to a 50 mile radius from Times Square. Under the statute, the Attorney General is as free to make it 10 miles, or to confine the alien to his own home and yard. Is the Communist less of a "menace" in the Times Square area than on the eastern shore of Maryland or on the Connecticut Sound? Or perhaps is there greater safety in some American-created Siberia?

Here some of the appellants are required to discontinue their membership in the Communist Party, although to do that, would mean the loss of their lawful jobs, their only source of income. If this may be accomplished thus indirectly, has the Attorney General not the power to order that they resign other lawful jobs or forfeit other financial benefits? And has he not as well the power to order them

to resign from the American Legion, the Catholic Church, the National Association for the Advancement of Colored People? He has ordered the appellants to cease their associations with other Communists, although some of them must continue such associations to maintain lawful occupations or would desire to continue such associations to extend lawful social relations, many of long standing. If this may be accomplished thus indirectly, is the appellee not free to order them to stop association with all other Americans, on the "germ" theory of the spread of Communism and thus place the appellants in virtual solitary confinement within their 50 mile circle?

By virtue of the delegation granted by Section 1252(d), to control the lives of and restrict the liberty of aliens—violation constituting a felony bearing criminal penalty—the Attorney General has been given a free hand. In fact, by virtue of the criminal penalty, he has been given power to legislate a series of crimes, for conduct or activity, which is not otherwise, and, in some instances, could not be made criminal.

The "Orders of Supervision" here were made in alleged pursuance of such an unlawful delegation of power. The "Orders" and the statute must, therefore, be declared invalid and void and in violation of Article 1, Section 1 of the United States Constitution.

(b) 8 C. F. R. §242.3(c) is an unlawful re-delegation of legislative power.

The unrestricted power granted by Section 1252(d) has been unrestrictedly re-delegated by the Attorney General, under 8 C. F. R. §242.3(c) to the "district director, district enforcement officer, or officer in charge, having administrative jurisdiction over the office in which the detention or release of [the] alien was authorized," although the statute placed the power in the Attorney General him-

self. Even in a situation in which no specific rule authorized such a delegation, Justice BLACK, dissenting in *Carlson* v. *Landon, supra,* questioned the constitutionality of such a delegation. He stated:

> "It is bad enough to read an Act as vesting even the Nation's chief prosecutor with power to determine what individuals he prosecutes should be held in jail without bail. Delegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions. I am not willing to imply that Congress has granted power to make such delegations which so ominously threaten the liberty of individuals." [at 554]

(c) The supervisory conditions imposed here are a usurpation of a legislative power.

It is well settled that: "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter,* 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Products Corp.,* 315 U. S. 475, 489 (1942).

(1) *As to Paragraphs 6 and 7 of the "Orders of Supervision"*

Section 4(f) of the Internal Security Act of 1950 [50 U. S. C. A. §783(f)] provides:

"Neither the holding of office nor membership in any Communist organization shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

Yet paragraphs 6 and 7 of the "Orders of Supervision" [in some instances 5-a and 5-b] proscribe membership in the Communist Party and its "affiliates". Violations of the proscriptions of paragraphs 6 and 7 become subject to the criminal penalties provided by Section 1252(d). The action of the appellee, therefore, in incorporating paragraphs 6 and 7 in the "Orders" "has the effect to subject * * * persons to fines and penalties under the act, that are excluded therefrom, by the terms of" the Internal Security Act of 1950.

Clearly this assumption of power by the administrative officer, contrary to the express policy and provision of Congress, is a usurpation of Congress' legislative function, in violation of Article 1, Section 1 of the Constitution.

(2) *As to paragraph 8 of the "Orders of Supervision"*

Paragraph 8 of the "Orders of Supervision" [in some instances 5-c] direct that the alien:

"* * * shall not violate sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Sec. 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

Section 2385 of the "Smith" Act provides that as the penalty for its violation, the convict:

"Shall be fined not more than $10,000 or imprisonment not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

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The penalty section of Section 4 of the Internal Security Act provides:

> "Any person who violates any provision of this section, shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

Clearly it was the design of Congress that *these* should be the penalties for violating either law. The inclusion of a further prohibition against their violation in the "Orders of Supervision"—an obvious redundancy in light of the existence of the statutes—has the effect, only, of increasing the penalties for their violation by applying to such violation the additional criminal penalties of Section 1252(d): namely, an additional year's imprisonment and fine of an additional $1,000.

Of such administrative action, this Court said in *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 404 (1944):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Wallace* v. *Cutten, supra*, [298 U. S. 229]."

Paragraph 8 is, therefore, manifestly a violation of Article 1, Section 1 of the United States Constitution.

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VI. Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States.

A statute which, on its face and as applied, is so vague and indefinite, as to permit within its scope its administrators and enforcers, to burden, prohibit or make criminal, conduct and belief which are constitutionally permissible and protected, violates the Fifth Amendment and, as well, the constitutional provision protective of the exercise of such conduct or the holding of such belief. *Winters* v. *New York*, 333 U. S. 507 (1948); *Herndon* v. *Lowery*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

(a) As to Subsection (4).

Subsection (4) of Section 1252(d), in according to the Attorney General an undefined latitude to impose "written restrictions on [the alien's] conduct and activity," and in making criminal their violation, is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York, supra* at 509. An alien, whether deportable or not, while in residence here is entitled the guarantees of freedom of speech, press and association protected by the First Amendment. *Bridges* v. *Wixon, supra; see*: *Chew* v. *Colding, supra.*

The statute, as applied in the instant case by the "Orders of Supervision," does in fact create restrictions upon the conduct of the appellants which deprive them of First Amendment rights. The "Orders of Supervision" command each of the appellants, with minor deviations in some instances, to:

> "* * * terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Com-

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munist Political Association, the Communist Party of any state, or of any foreign state, or any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization."

"* * * refrain from associating with any person, knowing or having reasonable ground to believe that such a person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in [the above] Paragraph."

The mere statement of these blanket prohibitions is adequate to demonstrate that they are the type of ban that is prohibited by the First Amendment's guarantees of freedom of speech, press and assembly. *American Communications Association* v. *Douds, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931). The Communist Party has never been declared illegal, nor membership in it or association with it, *per se,* a crime. *See*: *Rogers* v. *United States,* 340 U. S. 367, 372 (1951). On the contrary, mere membership has been statutorily declared not to be a crime. [50 U. S. C. §783(f)]. Nor has every policy or doctrine attributed to the Communist Party been declared—even by the Courts—to be violative of any law of the United States, nor in fact may they be made so. *See*: *Jamison* v. *Texas,* 318 U. S. 413 (1943).

Furthermore, the language of the prohibitions referred to above is so vague and indefinite as to make it impossible for the appellants to ascertain what it is they must or may not do, under criminal penalty, in violation of their rights under the Fifth Amendment. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const. Co.,* 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921).

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What is to be deemed "support" of doctrines and policies of the Communist Party? Does it mean public speech making? Or does it prohibit, as well, approval expressed over the dinner table to friends or neighbors? Does it prohibit writing such approval in a newspaper, or in a letter? Does it prohibit attending a meeting where such doctrine or policy is discussed? Does it mean working, for pay, for such an organization, whether as a file clerk or as a director?

What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? Is writing permitted, but walking on a picket line prohibited? Is attending a meeting permitted, but organizing a meeting or speaking at it prohibited?

What is meant by "doctrines" or "policies" of the Communist Party? Does it mean doctrines and policies held exclusively by the Communist Party and by no other organizations and persons? Does it mean any doctrine or policy adhered to by the Communist Party, although tens of organizations and thousands of other persons also subscribe to them? Are they those expressed in the constitution of the Communist Party? In the Daily Worker? Or those expressed by a Communist street-corner speaker in Kalamazoo? Or those expressed by the head of the Communist Party of a "foreign state"?

What is to be deemed an "affiliate" of the Communist Party, from which the appellants must disassociate and terminate membership and desist from supporting its doctrines and policies? There is no legislative or judicial finding as to which organizations are "affiliates" of the Communist Party, or of the Communist Parties of the various states, or political or geographical subdivisions of the states, or of the various foreign countries. *See*: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123

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(1951). Will the appellee deem an "affiliate" to be an organization whose policies are identical with that of the Communist Party? Or some of whose policies are the same? Or is the determinant to be the number of Communists who are officers of the organization, or members of it, and if so, how many?

With whom shall the appellants refrain from associating? What is meant by "associating" under this paragraph? Does it mean "associating" in the Communist Party? Or does it mean that they shall not pass the time of day with a Communist on a street corner? Does it mean that, in the course of legitimate work, they may not speak to a Communist in connection with it? May they not invite Communists to their homes for a social Saturday evening? Must they forsake life-long friends who may be Communists?

What is "reasonable ground to believe" that a person is a Communist? Must the appellants become insurers of the political probity of each person that they meet? Is there a burden on the appellants to inquire of people if they are Communists? If the answer is: "No," are the appellants entitled to believe the answer, or must they investigate the truth of it? How are the appellants to know whether such a person is engaged in the "promotion of any of the activities" mentioned in the "Orders of Supervision" when it is all but impossible to ascertain what "activities" are referred to or what "affiliations"?

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the appellants must make such determinations at the risk of criminal indictment. As this Court recently said in *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what per-

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sons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

By virtue of the undefined latitude of subsection (4) of Section 1252(d), the Attorney General, in the "Orders of Supervision," deprives the appellants of the liberty—without due process of law—to travel beyond a radius of 50 miles from Times Square. Such restrictions on freedom of movement have been held to be deprivations of liberty in violation of the Fifth Amendment. See: *Williams* v. *Fears, supra; Allgeyer* v. *Louisiana, supra; Bauer* v. *Acheson, supra.*

Similarly, the indefiniteness of subsection (4) has enabled the appellee to impose the condition, contained in paragraph 3-b of the "Orders of Supervision", that the appellants may not change their places of residence without the express permission of the Immigration Service, to be granted or withheld in its apparently unrestricted discretion. Not only does this condition constitute the same type of deprivation of liberty as the 50-mile travel restriction, but it has been and may, as well, be applied to frustrate a removal of residence designed by the appellants in aid of their employment, or to secure or better their livelihoods—property rights which accrue to them under the constitution. *See*: *Takahashi* v. *Fish Comm'n, supra.*

(b) As to Subsection (3).

Subsection (3) of Section 1252(d) authorizes the Attorney General to, and by paragraph 2 of the "Orders of Supervision" he requires the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, whether or not related to the foregoing as the Attorney General may deem fit and proper." Failure to comply with such a direction renders the alien subject to the criminal penalties of Section 1252(d).

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The courts have held that aliens are entitled, even in a pending deportation proceeding, to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment. *Schoeps* v. *Carmichael*, 177 F. 2d 391, 400 (C. A. 9th, 1949), *cert. den.* 339 U. S. 914; *United States ex rel Mezei* v. *Shaughnessy, supra* at 968. The language of the instant statute, on its face and as applied here, is broad enough to permit the interrogation on subject matters and compel responses, under threat of criminal penalty, concerning matters which may tend to incriminate the alien within the meaning of the Fifth Amendment. Such statutory compulsion renders a statute violative of the self-incrimination clause of the Fifth Amendment. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Smith* v. *United States*, 337 U. S. 137 (1949). The language of 1252(d), which is so broad as to encompass such compulsion, renders Section 1252(d) void in violation of the Fifth Amendment. *Cf. Winters* v. *New York, supra.*

(c) As to Subsections (1) and (2).

Subsections (1) and (2) of Section 1252(d), requiring appearance for identification "from time to time" and for medical and psychiatric examination "when necessary" are so indefinite in their direction, as to permit the Attorney General to convert those requirements into means of depriving an alien of his liberty or property.

"From time to time," or "when necessary" is not a limitation, but an absence of limitation. The Attorney General is free to compel an alien to appear daily or twice or three times a day, making such appearances a virtual substitute for physical detention. This reporting may become so frequent as to make the strain of it a serious threat to the alien's health, or so time-consuming as to make it impossible for an alien to retain a job to support himself or his family. In the instant cases, it seriously affects both aspects of the appellants' lives.

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Such an undefined grant of power cannot be squared with the Fifth Amendment.

VII. The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power.

Section 1252(d) requires that the restrictions imposed by the Attorney General on the conduct or activity of the alien be "reasonable". Each of the appellants, in his complaint and affidavit in support of his motion for temporary relief, has set forth facts to establish that, as to each of them, the regulations of and restrictions upon his conduct are unreasonable and an abuse of power. It is submitted that, even assuming *arguendo* the constitutional validity of Section 1252(d) and the provisions of the "Orders of Supervision," the "Orders," being unreasonable, are illegal and should not be enforced.

CONCLUSION

Plenary consideration of this appeal should be afforded to the appellants and the decision of the court below reversed.

Respectfully submitted,

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Appellants.

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APPENDIX

Opinion of Statutory Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 93-285, 93-286, 93-287, 93-288, 93-289, 93-290, 93-291, 93-292, 93-293, 93-294, 93-228

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Civ. No. 87-98, 87-99, 87-124

BETTY GANNET, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant.

Before: MEDINA, Circuit Judge, and
McGOHEY and WEINFELD, District Judges.

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Opinion of Statutory Court

BLANCH FREEDMAN & GLORIA AGRIN, Attorneys for Plaintiffs.

J. EDWARD LUMBARD, United States Attorney, Attorney for Defendant; HAROLD R. TYLER, JR., HAROLD J. RABY, Assistant United States Attorneys and LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service, of Counsel.

MEDINA, Circuit Judge:

The pleadings and issues in the fourteen actions before us are substantially the same. Each of the plaintiffs is an alien who has been ordered deported from the United States after appropriate administrative proceedings which none has sought to review by any judicial proceeding. The order of deportation in each case was based on an administrative finding that, after entering the United States, the plaintiff had been a member of the Communist Party of the United States. Final orders and warrants for the deportation of each of the plaintiffs have been outstanding for more than six months.

Three of the plaintiffs, namely, Gannet, Bittleman and Jones, have not been deported primarily because they were tried and convicted of violations of the penal provisions of the Smith Act for conspiring to advocate the overthrow of the United States Government by force and violence. These plaintiffs have been sentenced to various terms of imprisonment and are now at liberty on judicial bond pending their appeals in the criminal action. With respect to the other eleven plaintiffs, they have not been deported by reason of the inability of the immigration authorities physically to effectuate deportation. Some of the plaintiffs are so-called "stateless persons"; others have been denied, temporarily at least, readmittance to the countries of their nativity or last residence prior to coming to the United States.

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Since more than six months have elapsed from the entry of the final orders of deportation, the defendant has released the plaintiffs from custody on supervised parole in accordance with the express provisions of Section 242(d) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252(d),[1] and the regulations promulgated thereunder, 8 C. F. R. §242.3(c),[2] the constitutionality of which plaintiffs now seek to attack.

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1. Section 242(d) of the Immigration and Nationality Act of 1942, 8 U. S. C. §1252(d), provides as follows:

"(d) *Supervision of deportable alien; violation by alien.*

Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

2. 8 C. F. R. §242.3(c) provides as follows:

"(c) *Release; supervision after six months' period has expired; warning of penal provisions.*

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As may be seen, the regulations which have been promulgated under Section 242(d) of the Immigration and Nationality Act of 1952 closely follow the statutory language. Likewise, the orders of supervision pursuant to which the plaintiffs were released from custody on supervised parole substantially follow the language of the statute and the regulations, with the exception of certain restrictions with respect to plaintiffs' activities.[3] Although all of the plain-

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An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

3. The orders of supervision regulated and restricted the conduct and activity of each of the plaintiffs substantially as follows:

"THEREFORE, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitt-

[continued on page 59]

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tiffs have been notified by the defendant of the conditions of their parole under Section 242(d), they have refused to sign the written orders of supervision, copies of which are attached to their respective complaints.

Since the time of the plaintiffs' release from the custody of the defendant on supervised parole, no action of any

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ing to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) on Thursday of each week, bet. 8:45 A.M. & 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

(5)(a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from 'associating' with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the

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kind with respect to any of the plaintiffs has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action.

Following the issuance of the orders of supervision, the plaintiffs commenced these actions in this Court, each respectively seeking a declaratory judgment and injunctive relief. The complaints ask that a declaratory judgment be made and entered declaring that Section 242(d) of the Immigration and Nationality Act of 1952, the regulations promulgated thereunder, and the orders of supervision issued against the plaintiffs, are all "unconstitutional, invalid, illegal, void and inoperative," and declaring that the particular provisions of the orders of supervision "are unreasonable and an abuse of discretion." The complaints further demand that an order be made and entered directing the defendant to set aside and cancel the orders of supervision, and that the defendant be enjoined from re-

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[continued from page 59]

term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

(6) That said alien shall not travel outside a radius of 50 miles from Times Square, New York, N. Y. without written permission of an appropriate officer of the Immigration & Naturalization Service, New York District."

The orders of supervision vary in certain unimportant respects, *e.g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted.

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quiring the plaintiffs to obey the conditions of their supervised parole as contained in the orders of supervision.

The plaintiffs have moved, by means of orders to show cause issued at the same time the various complaints were filed, for temporary injunctions against the defendant pending the hearing and determination of the actions. In all cases, temporary restraining orders were issued by single judges of this Court, relieving plaintiffs from any obligation of compliance with the varying provisions of the orders of supervision, pending the hearing and determination of the plaintiffs' motions for temporary injunctions.

The defendant has cross-moved with respect to all fourteen complaints, asking the Court for an order (1) dismissing all of the complaints herein, pursuant to Rule 12(b) of the Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving the temporary restraining orders herein pursuant to Rule 65(b) of the Rules of Civil Procedure and Title 28, United States Code, Section 2284(3); and (3) appointing a three-judge Court, in accordance with the provisions of Title 28, United States Code, Sections 2282 and 2284, to hear and determine the matters herein in issue.

The plaintiffs' attorneys offered no opposition to the defendant's application for the appointment of a three-judge Court, and, accordingly, on June 21, 1954, this statutory Court was designated in accordance with the appropriate provisions of Title 28, United States Code, Section 2284. All of these actions, including the various motions, were heard together on June 30, 1954, pursuant to orders of this Court, dated June 21, 1954, and June 23, 1954, respectively, and extensive arguments were made by counsel for both sides. On July 27, 1954, the temporary restraining orders referred to above were modified in certain similar respects by an order of this Court, and, as so modified,

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continue to be outstanding against the defendant in all the cases.

The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate;[4] and it has long been settled law that the constitutional powers of the federal courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do.

The District Director is a subordinate official who has no power to take any further action with respect to these plaintiffs beyond what he has already done. His authority ceased with the issuance of the orders of supervision and the release of plaintiffs from custody on supervised parole. Nor is it claimed or alleged in any of the complaints that the District Director has in any manner threatened to take further action against plaintiffs or any of them. Nowhere is it alleged that any of the plaintiffs has violated the terms of the statute under attack. A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine. Thus if they refuse to comply with the conditions of their parole, it is the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted. For aught that now appears there may be no actual prosecution of any of these plaintiffs, and the factual background indispensable to the determination of any such prosecution, should it take place, is in futuro and as yet non-existent.

The principle involved here is, in substance, the same as that reaffirmed by the Supreme Court in *United Public*

4. *Massachusetts* v. *Missouri*, 308 U. S. 1, 17 (1939); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272 (1941).

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Workers of America (C.I.O.) v. *Mitchell*, 330 U. S. 75 (1947). There, certain employees of the executive branch of the Federal Government and a union of such employees sued to enjoin the members of the Civil Service Commission from enforcing the provision of Section 9(a) of the Hatch Act which forbade such employees to take "any active part in political management or in political campaigns" and for a declaratory judgment holding the Act unconstitutional. In denying declaratory relief to all but one of the employees, on the ground that they had failed to present a justiciable controversy, the Court pointed out that these employees did not allege that they had violated the Act, or that the Commission had actually threatened to interfere with their rights, but only that they desired to engage in acts of political management and in political campaigns and understood that if they engaged in this activity the Commission would order their dismissal from federal employment. A consideration of these factors compelled the Court to conclude that these employees "seem[ed] clearly to seek advisory opinions" as to whether or not they could "act contrary to the rule against political activity." As to these employees, the Court stated (pp. 89-90):

> "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. * * * [T]he facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy.
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> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

The Court decided that one employee, Poole, was entitled to a declaratory judgment, as his suit presented a justiciable controversy. In so deciding, the Court pointed out that Poole admitted that he had violated the Act, that he had been charged by the Commission with political activity, and that a proposed order for his removal had been issued by the Commission subject to his right to reply to the charges and to present further evidence in refutation.

Here, the lack of any actual and existing controversy between the parties plaintiff and defendant is too clear for reasonable debate, as defendant is not now nor will he ever be charged with the duty of enforcing this criminal statute.

Accordingly, the complaints are dismissed, plaintiffs' motions denied, and the temporary restraining orders vacated.

Dated: October 11th, 1954.

HAROLD R. MEDINA
United States Circuit Judge

JOHN F. X. MCGOHEY
United States District Judge

EDWARD WEINFELD
United States District Judge

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